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In The

# Supreme Court of the United States

ELMON WALTERS, ALIX PROVENCE, CHARLENE BLACKSHEAR, CEDRIC JORDAN and all others similarly situated,

*Petitioners,*

versus

AMERICAN COACH LINES OF MIAMI, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the current trend of expanding the scope of the FLSA's motor carrier exemption by reading into 49 U.S.C. § 13501 DOT jurisdiction over wholly in-state transportation contravene fundamental constitutional tenets forbidding judicial interpretation of clear, unambiguous statutes, and vitiate jurisprudence that requires exemptions to the FLSA to be construed narrowly and in favor of furthering the humanitarian purpose of the FLSA?

2. Where we are instructed to construe the FLSA's motor carrier exemption narrowly, may courts go beyond the plain language of 49 U.S.C. § 13506(a)(8)(A) to broaden DOT jurisdiction and deny overtime rate pay to drivers of purely local, wholly in-state transportation?

3. Does the denial of overtime rate pay to drivers of purely local, wholly in-state transportation comport with, or further, the legislative purpose of the FLSA or the MCA?

## LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The following is a list of all parties to the proceeding in the circuit and district courts whose judgment is sought to be reviewed, as well as a corporate disclosure statement as required by Rule 29.6.

**Petitioners:**

Barrett, Teddy

BellaFleur, Jean F.

Blackshear, Charlene

Brown, Richard Kevin

Burns, Bennie

Chambers, Gilbert

Chapman, Gwendolyn

D'Elia, Joseph

Dobson, Pashun

Ferrer, Richard

Fletcher, David

Harper, Dwayne

Hernandez, Ricardo Nunez

Jackson, Felicia

Jefferson, Melvin

Jordan, Cedric

Lee, Christopher

Lee, Rogers

**LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT** – Continued

Legrand, Herve

Lewis, Rupert

McConico, Yvonne

Moran, Jome

Morejon, Israel

Moreno, Luis

Moreno, Ramon

Munoz, Francisco

Pedrozo, Scarllet

Price, Lloyd

Provence, Alix

Rosenthal, Brant

Roswess, Clifford

Saenz, Juan Carlos

Saunders, Dwayne

Sheffield, Buford

Sinclair, Charlie

Smith, Callisto

Valega, Oscar

Valera, Flor G.

Veliz, Carlos Eduardo

Walters, Elmon

## LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

Yera, Felix

Zellner, Frederick

**Counsel for Petitioners:**

Robert Ader, Esq.

Elizabeth B. Hitt, Esq.

Law Offices of Robert Ader, P.A.

**Respondent and Respondent's Affiliates:**

ACL Leasing, LLC

America Charters, Ltd.

American Coach Lines of Atlanta, Inc.

American Coach Lines of Jacksonville, Inc.

American Coach Lines of Miami, Inc.

American Coach Lines of Orlando, Inc.

American Coach Lines, Inc.

B & A Charter Tours, Inc.

Coach Am Group Holdings, Corp.

Coach Am Holdings, Corp.

Coach America Group Holdings, LP

Coach America Group, Inc.

Coach America Holdings, Inc.

CUSA ASL, LLC

CUSA AT, LLC

CUSA AWC, LLC

**LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT** – Continued

CUSA BCCAE, LLC

CUSA BESS, LLC

CUSA CC, LLC

CUSA Corporate Travel, LLC

CUSA CSS, LLC

CUSA EE, LLC

CUSA ELKO, LLC

CUSA ES, LLC

CUSA FL, LLC

CUSA FTT, LLC

CUSA GCBS, LLC

CUSA GCT, LLC

CUSA KBC, LLC

CUSA K-TCS, LLC

CUSA Leasing, LLC

CUSA PCSTC, LLC

CUSA PRTS, LLC

CUSA RAZ, LLC

CUSA Transit Services, LLC

CUSA, LLC

KBUS Holdings, LLC

Lakefront Lines, Inc.

Midnight Sun Tours, Inc.

**LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT** – Continued

Royal Tours of America, Inc.

Southern Coach Company

Southern Tours, Inc.

The McMahon Transportation Company

Tippett Travel, Inc.

Trykap Airport Services, Inc.

Trykap Transportation Management, Inc.

No publicly held corporation owns 10% or more of the stock of American Coach Lines of Miami, Inc.

**Counsel for Respondent:**

Michael W. Casey, III, Esq.

Richard D. Tuschman, Esq.

Kevin E. Vance, Esq.

Epstein, Becker & Green, P.C.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Walters v. American Coach Lines of Miami, Inc.*, 575 F.3d 1221 (11th Cir. 2009). The decision of the U.S. District Court, Southern District of Florida is reported at 569 F.Supp.2d 1270 (S.D. Fla. 2008). These opinions are reproduced in the Appendix at 1-30 and 31-108, respectively.

## STATEMENT OF JURISDICTION

The Eleventh Circuit filed its decision on July 23, 2009, and entered an order denying Petitioners' motion for rehearing and rehearing *en banc* on October 5, 2009. Appendix at 109-10. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

## STATUTORY PROVISIONS INVOLVED

### 29 U.S.C. § 213(b)(1)

The Fair Labor Standards Act, at 29 U.S.C. § 213(b)(1) provides, in pertinent part:

> (b) Maximum hour requirements
>
> The provisions of section 207 of this title shall not apply with respect to –

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49. . . .

**49 U.S.C. § 31502**

49 U.S.C. § 31502 provides, in part:

(a) **Application.** – This section applies to transportation –

(1) described in sections 13501 and 13502 of this title. . . .

(b) **Motor carrier and private motor carrier requirements.** – The Secretary of Transportation may prescribe requirements for –

(1) qualifications and maximum hours of service of employees of . . . a motor carrier. . . .

**49 U.S.C. § 13501**

49 U.S.C. § 13501 provides:

The Secretary and the Board have jurisdiction, as specified in this part, over transportation by motor carrier . . . to the extent that passengers, property, or both, are transported by motor carrier –

(1) between a place in –

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent that transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

**49 U.S.C. § 13506(a)(8)(A)**

49 U.S.C. § 13506(a)(8)(A), under the heading "Miscellaneous motor carrier transportation exemptions", imparts, in significance:

(a) In general. – Neither the Secretary nor the Board has jurisdiction under this part over –

* * *

(8)(A) transportation of passengers by motor vehicle incidental to transportation by aircraft;

## STATEMENT OF THE CASE

Petitioners are a group of shuttle bus drivers currently or formerly employed by Respondent American Coach Lines of Miami, Inc. ("ACLM"), a private motor carrier company that provides for-hire ground transportation of passengers.

Petitioners brought this action, in the U.S. District Court for the Southern District of Florida, invoking the court's jurisdiction over federal questions, under 28 U.S.C. § 1331, alleging that they were not paid overtime rate pay as mandated by the Fair Labor Standards Act ("FLSA"). *See* 29 U.S.C. § 207(a)(1). Admitting that most of its drivers routinely work(ed) in excess of forty hours per week, and that it does not pay its drivers overtime rate pay, Respondent ACLM claimed that, as a motor carrier, it is exempt from the FLSA's overtime provisions, pursuant to 29 U.S.C. § 213(b)(1) – what has become commonly known as the FLSA's "motor carrier exemption".

Pursuant to its motor carrier exemption, the FLSA specifically exempts from its overtime wage pay requirement "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49". 29 U.S.C. § 213(b)(1). 49 U.S.C. § 31502 provides that the Secretary of Transportation may prescribe requirements for qualifications and maximum hours of service, but expressly limits its own application to

transportation described in 49 U.S.C. § 13501. In turn, § 13501 provides the Secretary of Transportation and the Surface Transportation Board "General Jurisdiction" over deliberately enumerated transportation, to wit, transportation by motor carrier:

> (1) between a place in –
>
> (A) a State and a place in another State;
>
> (B) a State and another place in the same State through another State;
>
> (C) the United States and a place in a territory or possession of the United States to the extent that transportation is in the United States;
>
> (D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or
>
> (E) the United States and a place in a foreign country to the extent the transportation is in the United States; and
>
> (2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

49 U.S.C. § 13501. The FLSA accordingly exempts from overtime pay employees engaged in transportation over which the Secretary of Transportation has explicit statutorily-derived jurisdiction.

As the vast majority of the transportation provided by Respondent ACLM occurred wholly within the State of Florida, and was primarily localized, ACLM argued that its ground transportation of passengers to and from regional airports and seaports constituted "interstate" transportation generating entitlement to the motor carrier exemption from overtime pay requirements.[1] Respondent claimed that, notwithstanding 49 U.S.C. § 13501's specific delineation of the types of transportation over which the Secretary of Transportation holds jurisdiction, the scope of the FLSA's motor carrier exemption has been interpreted to include "interstate" transportation encompassing entirely *intrastate* transportation which forms a part of an overall journey beginning or ending out of state.

Petitioners countered by asserting that the courts are bound by the plain, unambiguous language of 49 U.S.C. § 13501, which explicitly limits DOT[2] jurisdiction to transportation expressly set forth in this statute and, particularly where we are admonished to apply a narrow construction to the FLSA's motor carrier exemption, we cannot go beyond the jurisdictional purview of the statute to read into it a jurisdictional basis with which to employ the

---

[1] ACLM's out-of-State trips amount to far less than one percent of its overall trips. Appendix (hereafter "App.") at 6, n. 7.

[2] Petitioner utilizes "DOT" interchangeably to reference the Department of Transportation, as well as the Secretary of Transportation.

exemption; thus, the DOT does not have jurisdiction over ACLM's local shuttle service for purposes of denying local shuttle drivers their overtime pay.

Petitioners further argued that under 49 U.S.C. § 13506, Congress deliberately divested the DOT of jurisdiction over the "transportation of passengers by motor vehicle incidental to [their] transportation by aircraft." As ACLM's airport-to-seaport ground shuttle service fell squarely under the regulatory definition of transportation "incidental to air", Petitioners claimed the DOT had no jurisdiction over the shuttle service ACLM maintained was "interstate", and thus the motor carrier exemption did not apply.

The parties' respective positions were fully briefed in the district court on cross motions for summary judgment. In ruling thereon, the court: (1) declined to depart from what it considered the majority view of circuit courts which have "'explored the scope of the Motor Carrier Act exemption via inquiry into the presence or absence of interstate commerce'", and thus refused to limit the jurisdictional scope of DOT to transportation specifically provided under the plain language of 49 U.S.C. § 13501, App. at 66, n. 13; and, (2) found that, notwithstanding the statute's clear language, in ratifying 49 U.S.C. § 13506(a)(8)(A), Congress really meant only to repudiate DOT jurisdiction over economic issues, not safety-related issues, such as qualifications and maximum hours of service. App. at 83-92. Deciding that the DOT held jurisdiction over ACLM's local airport-to-seaport shuttle service, the district court

ruled that the Petitioner drivers were not entitled to their overtime pay.

On appeal, the Eleventh Circuit affirmed the rulings of the district court, reasoning: (1) in light of the stream of case law which has interpreted DOT jurisdiction to include entirely in-state transportation, the Petitioner/Appellants' plain language reading of 49 U.S.C. § 13501 was "restrictive" and, therefore, would not be adopted by the Circuit, App. at 18-20; and, (2) because the scope of the DOT's jurisdiction is determined solely by the strictures of 49 U.S.C. § 13501, none of the exceptions to DOT jurisdiction, including the incidental-to-air exception, are relevant, and, in any event, despite the statutory wording, Congress likely meant to deny only economic jurisdiction over transportation incidental-to-air. App. at 20-25.

Petitioners contend that the courts erred in going beyond the plain language of § 13501 to read into the statute a jurisdictional basis, and additionally erred in looking beyond § 13506(a)(8)(A)'s clear repudiation of authority over transportation incidental-to-air, to find jurisdiction for purposes of applying the FLSA's motor carrier exemption to drivers of Respondent's purely localized, wholly intrastate airport-seaport shuttle service.

On October 5, 2009, the Eleventh Circuit denied Petitioners' petition for rehearing and rehearing *en banc*. App. at 109-10.

## REASONS FOR GRANTING THE WRIT

This case concerns the continued validity of rulings of this Court, which clearly dictate that exemptions to the Fair Labor Standards Act ("FLSA") must be narrowly construed in order to further the remedial and humanitarian purpose of the Act. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453 (1960) (exemptions to the FLSA's coverage are to be narrowly construed as against the employer asserting them); *Tennessee Coal, Iron & Ry. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597, 64 S.Ct. 698 (1944), *superseded by statute on other grounds* (recognizing that the FLSA is a remedial statute, humanitarian in purpose). Although axiomatic in concept, these principles have waned in execution, in the wake of various decisions of circuit and district courts which have found it appropriate to go beyond the plain language of statutes in order to broaden the scope of the FLSA's motor carrier exemption to the overtime pay requirement.

Petitioners most respectfully assert that the current practice of reading into pertinent statutes language which appears nowhere therein, amounts to a judicial bestowal of Congressionally-limited jurisdiction, contravening fundamental constitutional tenets, and inhibiting the determinedly wide humanitarian grasp of the FLSA, in favor of exemptions thereto. Clearly this is not in accord with our charge to construe FLSA exemptions narrowly and in favor of the employee. The resultant deprivation of the right to overtime pay for countless numbers of persons

providing wholly in-state, local transportation, was not the intent of the framers in drafting either the FLSA's motor carrier exemption or the Motor Carrier Act, 49 U.S.C. § 10101, et seq. (hereafter "MCA").

## I. THIS COURT SHOULD CONSIDER THIS CASE DUE TO THE TREND OF EXPANDING THE SCOPE OF THE FLSA'S MOTOR CARRIER EXEMPTION BY READING INTO 49 U.S.C. § 13501 DOT JURISDICTION OVER WHOLLY IN-STATE TRANSPORTATION, DESPITE FUNDAMENTAL CONSTITUTIONAL TENETS WHICH PROHIBIT JUDICIAL INTERPRETATION OF CLEAR AND UNAMBIGUOUS STATUTES, AND IN CONTRAVENTION OF OUR OBLIGATION TO CONSTRUE EXEMPTIONS TO THE FLSA NARROWLY, IN FAVOR OF FURTHERING THE HUMANITARIAN PURPOSE OF THE FLSA.

In *Tennessee Coal,* 321 U.S. at 597, declaring the FLSA a remedial statute with a humanitarian purpose, this Honorable Court realized: "We are not here dealing with mere chattels or articles of trade but with the rights of those who toil. . . . Those are rights that Congress has specifically legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner." For that reason, the Court has cautioned that exemptions from FLSA's coverage are to be *narrowly construed against* the employer asserting them. *Arnold*, 361 U.S. at 392.

Indubitably, FLSA exemptions provided "in detail and with particularity . . . preclude enlargement by implication". *Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27, 35, 107 S.Ct. 2694, 2699 (1987). There is nothing vague about the FLSA's motor carrier exemption; 29 U.S.C. § 213(b)(1) clearly provides that the exemption only pertains to employees with respect to whom the DOT has power to establish qualifications and maximum hours of service "pursuant to the provisions of section 31502 of Title 49". In turn, § 31502 states, with precision, that the ability to establish qualifications and maximum hours of service is dependent upon the DOT's jurisdiction *as conferred by* 49 U.S.C. § 13501. Tracking the statutes, as we are instructed for purposes of the motor carrier exemption, we find the plain language of § 13501 limits DOT jurisdiction to transportation expressly listed therein – in short, transportation which crosses a state line.

Despite the admonition to afford a narrow construction to the FLSA's motor carrier exemption, courts, including the Eleventh Circuit, have *broadened* the reach of 29 U.S.C. § 213(b)(1), by directly expanding the scope of 49 U.S.C. § 13501 (the statute which indisputably affords, and defines the parameters of, the Secretary of Transportation's jurisdiction over enumerated transportation[3]), by reading into its

---

[3] As the Eleventh Circuit recognized, "49 U.S.C. § 31502(a)(1) references § 13501 to determine the scope of the

(Continued on following page)

jurisdictional purview the term "interstate commerce" and further defining this nebulous concept to include *wholly in-state* transportation which forms *a part of* the practical continuity of movement across state lines.[4] Courts, therefore, discount the fact that Congress, through § 13501, has prescribed specific limitations on the Secretary's jurisdiction, conferring jurisdiction *only insofar as* the transportation runs cross-border.[5]

While this Court long ago employed the term "interstate commerce" in the few decisions it issued concerning the motor carrier exemption,[6] it has never rendered an opinion which analytically discusses the issue or provides any rationale to justify going beyond the plain wording of § 13501 to find a jurisdictional basis with which to widen the scope of the motor carrier exemption to encompass employees engaged in "interstate" transportation. Circuit courts, following

---

Secretary's authority under the MCA, . . . to indicate to what transportation the MCA applies." App. at 21.

[4] *See, e.g., Bilyou v. Dutchess Beer Distrib., Inc.*, 300 F.3d 217, 223 (2nd Cir. 2002); *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1470 (9th Cir. 1997); *Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670, 672 (10th Cir. 1993); *Beggs v. Kroger Co.*, 167 F.2d 700, 702-03 (8th Cir. 1948).

[5] Had Congress wished the motor carrier exemption to preclude the right to overtime pay for employees engaged in "interstate commerce", it would have so worded 29 U.S.C. § 213(b)(1), or even 49 U.S.C. § 31502 or § 13501. It did not.

[6] *See Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, 67 S.Ct. 954 (1947); *Levinson v. Spector Motor Service*, 330 U.S. 649, 67 S.Ct. 931 (1947).

sixty-year-old decisions of this Court, likewise apply the motor carrier exemption to entirely in-state transportation, without analyzing the propriety of judicially creating DOT jurisdiction to deny workers their overtime pay. As more courts feel constrained by their predecessors' rulings, the bevy of case law finding that the motor carrier exemption applies to workers involved in purely local, wholly *intrastate* transportation continues to mount (in exponential proportion), notwithstanding that the Nation's Highest Court has never addressed the issue.

One circuit court Judge has, however. In *Packard v. Pittsburgh Transp. Co.*, 418 F.3d 246 (3d Cir. 2005), Judge Nygaard of the Third Circuit, in a well-reasoned concurring opinion, acknowledged the impropriety of looking beyond 49 U.S.C. § 13501's jurisdictional scope, where the statute's plain language is itself "dispositive." 418 F.3d at 259 (Nygaard, J., concurring). Judge Nygaard found it utterly unnecessary (and impliedly improper) to interpret the term "interstate commerce" where such a term *never* appears in the statute itself. *Id.* at 260-61 (providing a history of the misdirected focus on "interstate commerce" with respect to the motor carrier exception).

Judge Nygaard's unassailable analysis explains that those circuit courts which have interpreted the motor carrier exemption to include the term interstate commerce, have done so by erroneously relying on this Court's opinion in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 63 S.Ct. 332 (1943), a decision which spoke to the *threshold requirements*

for application of the FLSA, as found in §§ 206 and 207 of the Act, and did *not* consider the term interstate commerce in relation to *exemptions* from the FLSA overtime pay requirements, codified under § 213 of the FLSA. *Packard*, 418 F.3d at 259, n. 11 (Nygaard, J. concurring). Thus, courts which have expanded the contours of 49 U.S.C. § 13501 to include the term "interstate commerce" in its jurisdictional scope, have based their decision on faulty analysis. *Id.*

The assumption that it is necessary to decipher the term "interstate commerce" within the context of the motor carrier exemption, is also derived, as Judge Nygaard further explains, from language in the renowned *Levinson* opinion, in which this Court held that the Interstate Commerce Commission (now DOT) had the power to establish qualifications and maximum hours of service for employees of a motor carrier whose employment "affects the safety of transportation . . . in *interstate commerce*." *Id.* at 259 (quoting *Levinson v. Spector Motor Service*, 330 U.S. 649, 687, 67 S.Ct. 931 (1947)) (emphasis added). "It would appear", he adeptly reasons, that the *Levinson* Court's use of the term originated from "the then-existing statutory definition" of interstate commerce as: "commerce between any place in a State and any place in another State . . . whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." *Id.* at 260 (quoting 49 U.S.C. § 303(a)(10) (1940)). Because the current, relevant version of the Motor Carrier Act

contains a jurisdictional statute – § 13501, added post-*Levinson* – we must look to the plain language of *that statute* in order to determine the scope of the motor carrier exemption. *Id.*

Unfortunately, it appears that no other court has endeavored to ascertain the suitability of applying an obsolete statute, used back in the *Levinson* days, in lieu of the current and unambiguous jurisdictional statute, § 13501, to which the motor carrier exemption expressly directs us. Even in the case at bar, when specifically asked to engage in such examination, the courts below both declined, opting instead to look only to case law and regulatory opinion (which provide no analysis of the issue), without further scrutiny.

While Judge Nygaard's *Packard* opinion faithfully comports with canons of statutory construction, those courts that have thought it prudent to engage in an interpretive analysis of a statute undeniably clear on its face, fail to heed this Court's continued decree that we *cannot* go beyond the plain language of a statute to supply language which alters its scope or meaning, for to do so is to invade the province of the Legislature. *See, e.g.*, *Lamie v. United States Trustee*, 540 U.S. 526, 538-39, 124 S.Ct. 1023 (2004) (discussing the error of reading an absent word into a statute to effectuate a change in its scope, noting long-standing "deference to the supremacy of the Legislature"); *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146 (1992) (recognizing as the "cardinal canon" of statutory interpretation the rule

that courts "must presume that a legislature says in a statute what it means and means what it says there. . . . When the words of a statute are unambiguous, then, this first cannon is also the last: 'judicial inquiry is complete'."). It is not within the realm of the judiciary to travel outside clear statutory prescriptions to judicially confer jurisdiction beyond that which Congress specifically authorized. Respectfully, those courts that have inserted into § 13501's jurisdictional purview the term "interstate commerce" and attempted to discern its meaning through case law and regulatory definition, have acted beyond their constitutional boundaries.[7]

This Court has repeatedly "refused '[t]o extend an exemption to other than those plainly and unmistakably within [the FLSA's] terms and spirit.'" *Citicorp*, 483 U.S. at 35 (quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S.Ct. 807 (1945)). In order to maintain the viability of this principle, and because the Court has never rendered an opinion which speaks to the propriety of extending the scope of 49 U.S.C. § 13501 to include "interstate commerce" for purposes of broadening the FLSA's motor carrier exemption, Petitioners most respectfully implore this Honorable Court to consider the issue which will,

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[7] As § 31502's Revision Notes make clear: "Subsection (a) is included to maintain the jurisdictional scope of the source provisions from which subsections (b) and (c) of the revised section are taken."

undoubtedly, affect an untold many local shuttle drivers.

## II. THIS COURT SHOULD CONSIDER THIS CASE TO RESOLVE AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION: WHETHER, CONSISTENT WITH OUR FUNDAMENTAL DUTY TO CONSTRUE THE FLSA'S MOTOR CARRIER EXEMPTION NARROWLY, COURTS MAY GO BEYOND THE PLAIN LANGUAGE OF 49 U.S.C. § 13506(a)(8)(A) TO FIND DOT JURISDICTION, THE DIRECT RESULT OF WHICH BROADENS THE SCOPE OF THE MOTOR CARRIER EXEMPTION AND DENIES OVERTIME PAY TO DRIVERS OF PURELY LOCAL TRANSPORTATION.

Notwithstanding the general grant of jurisdiction found under 49 U.S.C. § 13501, Congress has created exceptions to DOT jurisdiction within the very same chapter, Chapter 135 titled "Jurisdiction", the effect of which is to strip from the Secretary's general authority certain specified types of transportation. 49 U.S.C. § 13506(a)(8)(A) (2002) relates, "[n]either the Secretary nor the Board has jurisdiction under this part over . . . transportation of passengers by motor vehicle incidental to transportation by aircraft".[8] Frequently referred to as the incidental-to-air statute,

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[8] Section 13506 is titled "Miscellaneous motor carrier transportation exemptions".

§ 13506(a)(8)(A) *specifically* and *unequivocally* divests from DOT jurisdiction the ground transportation of passengers which is incidental to their air travel.

There is no question that Respondent ACLM's airport/seaport shuttle service falls squarely within the statutory and regulatory definition of transportation "incidental-to-air".[9] Nor is there any dispute that absent DOT jurisdiction over the transportation in question, the motor carrier exemption will *not* foreclose an employee's right to overtime pay. *See* 29 U.S.C. § 213(b)(1); *see also, Levinson*, 330 U.S. at 660.

As with their expansion of 49 U.S.C. § 13501's general grant of DOT jurisdiction, the district and

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[9] DOT regulations codify the criteria for employing the incidental-to-air statute:

> (a) *Passengers having an immediately prior or subsequent movement by air.* The transportation of passengers by motor vehicle is transportation incidental to transportation by aircraft provided (1) that it is confined to the transportation of passengers who have had or will have an immediately prior or immediately subsequent movement by air and (2) that the zone within which motor transportation is incidental to transportation by aircraft . . . shall not exceed in size the area encompassed by a 25-mile radius of the boundary of the airport at which the passengers arrive or depart. . . .

49 C.F.R. § 372.117. App. at 111. There was no dispute that ACLM's shuttle service was confined to the transportation of passengers having an immediate prior or subsequent movement by air, nor any dispute that the subject airport-to-seaport transportation was provided within a 25-mile radius of South Florida airports.

circuit courts again stretched beyond plain statutory language, this time finding that, *despite its clear, comprehensive repudiation* of jurisdiction over transportation incidental-to-air, § 13506(a)(8)(A) *saves* to the Secretary the authority to regulate qualifications and maximum hours of service of employees engaged in the ground transportation of airline passengers. In so determining, the courts opined that 49 U.S.C. § 31502 plainly meant to incorporate only the types of transportation listed under § 13501,[10] and not any exceptions to the Secretary's jurisdiction listed elsewhere in the jurisdictional statutes, "which therefore seem to be irrelevant." App. at 21. But, where § 13501 bestows jurisdiction "as specified in this part", exceptions to jurisdiction, *contained in the very same part*, cannot be immaterial in determining jurisdictional scope. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16, 126 S.Ct. 941 (2006) (find, under the rule of *in pari materia*, "statutes addressing the

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[10] Notably, this view directly conforms with Petitioner's earlier argument (*see, supra*, Section I) that the DOT's jurisdiction is limited to the transportation specifically referenced in § 13501 – a reading the circuit court found too "restrictive" when the court allowed the insertion of the term "interstate commerce" to be read into the statute. App. at 18. The circuit court then *conversely* decided that, "[t]here is no indication that [§ 31502(a)(1)] is meant to incorporate anything other than the descriptions of transportation contained in § 13501", App. at 21, and found a "restrictive" reading of § 13501 appropriate to reject Petitioners' argument that § 13506(a)(8)(A) divests the DOT of jurisdiction over transportation incidental-to-air. Petitioners maintain that these two rulings cannot be squared.

same subject matter generally should be read 'as if they were one law.'").

As further reason to beget jurisdiction, both courts again thought it fitting to travel beyond *clear* statutory language and engage in statutory interpretation, by looking to the text of the *predecessor* incidental-to-air statute, to derive language saving to the DOT authority over safety-related issues involving transportation incidental to air.[11] To be sure, in enacting the *current*, pertinent version of § 13506(a)(8)(A), Congress did *not* reserve to the DOT the power to prescribe regulations regarding driver qualification and hours of service; nowhere in the statute does such a reservation of jurisdiction exist. Still, the courts maintained that because the statute's predecessor expressly acknowledges such a reservation,

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[11] A *prior* version of the incidental-to-air statute contained limiting language, expressly retaining ICC regulatory authority over qualifications and maximum hours of service, thereby becoming what *was* referred to as an economic exclusion:

> Nothing in this part, *except the provisions of Section 204 relative to qualifications and maximum hours of service* of employees and safety of operations or standards of equipment shall be construed to include . . . the transportation of persons or property when incidental to transportation by aircraft. . . .

203(b)(7a) of the Interstate Commerce Act (emphasis added). Through the years the statute was recodified and the limiting language removed, and, in 1996, when the ICC was abolished, it appeared in current form, as § 13506(a)(8)(A), mandating that the DOT has *no* jurisdiction over transportation incidental to air.

the legislature *must have meant* the current version to contain the same reservation.

Noting that no other court has addressed the scope of 49 U.S.C. § 13506(a)(8)(A), the circuit court relied on *Bilyou v. Dutchess Beer Distributors, Inc.*, 300 F.3d 217, 223 (2nd Cir. 2002), which similarly looked to legislative history to reach its holding that § 13505 limited only the DOT's jurisdiction over economic matters, for purposes of determining the applicability of the FLSA's motor carrier exemption. App. at 22-25. But, *Bilyou's* historical trek cannot be utilized to support its notion that an antiquated version of a statute applies to supplant a current version of the statute. To the extent that the court relied on *Bilyou* to do just that, Petitioners maintain that such was improper.[12]

*Mielke v. Laidlaw Transit, Inc.*, 102 F.Supp.2d 988 (N.D. Ill. 2000), unlike *Bilyou*, fully analyzed the issue to find that where, *pursuant to § 13506,*

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[12] The court additionally noted its reliance upon other cases which have similarly determined the scope of DOT jurisdiction; however, these opinions also fall exceedingly short in their analysis, discussing only the obsolete version of the statute which, again, *expressly* reserves jurisdiction relative to qualifications and maximum hours of service. *See King v. Asset Appraisal Services, Inc.*, 470 F.Supp.2d 1025, 1031-32 (D. Neb. 2006) (relying almost exclusively on *Bilyou*, and citing cases, likewise deficient in analysis, involving the now obsolete version of the statute); *Klitzke*, 110 F.3d at 1148 & n. 2 (relying on the statute's former codification); *Friedrich v. U.S. Computer Services*, 974 F.2d 409, 413 (3d Cir. 1992) (same).

Congress expressly denied the DOT jurisdiction over certain transportation, such exceptions to jurisdiction worked to strip the DOT of authority to regulate driver qualifications and maximum hours of service, thus the motor carrier exemption did not apply to foreclose the right to overtime pay. Paying homage to manifest principles of constitutional jurisprudence, *Mielke* rejected the argument that § 13506's exemptions worked only to deny DOT jurisdiction over economic regulations, recognizing that the legislature's deletion of the defunct statute's limiting language *cut against* the argument that the legislature meant to reserve to the DOT the power to regulate qualifications and maximum hours of service: "we simply cannot credit the argument that, although Congress deleted the reservation language, it clearly intended the reservation to continue." *Id.* at 991.

*Mielke* has never been overturned, is squarely on point, well-reasoned, and remains good law.[13] Nevertheless, the circuit court opted to align itself with *Bilyou*, finding it more "persuasive" to support its decision. App. at 24. Yet, in adopting and utilizing *Bilyou's* analysis of antiquated statutes to employ an expansive reading of the modern-day incidental-to-air statute, the court concomitantly expanded the motor

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[13] *See also, Reich v. New Mt. Pleasant Bakery, Inc.*, No. 89-CV-581, 1993 WL 372270, at *5 (N.D.N.Y. Sept. 13, 1993) (concluding that what is now 49 U.S.C. § 13505 exempts from DOT jurisdiction drivers delivering baked goods, such that the FLSA's motor carrier exemption did *not* apply).

carrier exemption in contravention of its duty to apply a narrow construction to the FLSA's exemptions. At least one other court has recognized the incongruity this has caused, acknowledging, "[t]o be sure, *Mielke's* approach is fully consistent with the well-settled doctrine that FLSA exemptions and exceptions are to be construed narrowly against the employer seeking to assert them"; yet, that court, too, has chosen to ignore this recognition, favoring instead a broad construction. *Hoffman v. First Student, Inc.*, No. AMD 06-1882, 2009 WL 1783536, at *6 (D. Md. June 23, 2009) (ultimately ruling that § 13506(a)(1) does not usurp DOT's ability to regulate qualifications and hours of service for school bus drivers).

It is not the courts' function to re-write statutes. Once again, we cannot insert language into a statute which would alter the meaning of its plain language, as to do so would be to encroach on the distinct province of the legislature. *Lamie*, 540 U.S. at 538-39. Nor is it the judiciary's function to engage in statutory interpretation in order to reach what the judiciary *presumes* is the intent of the legislature. *Conn. Nat.*, 503 U.S. at 253-54. Particularly where the legislature has chosen to excise language from a predecessor statute, we *must* assume that Congress' action in doing so was deliberate and with the intent to effectuate a change. *Brewster v. Gage*, 280 U.S. 327, 337, 50 S.Ct. 115 (1930) ("deliberate selection of language . . . differing from that used in the earlier Acts" indicates that "a change of law was intended").

With the utmost respect, Petitioners submit that the courts erred in reaching beyond the plain language of the MCA's incidental-to-air statute, to employ an expansive interpretation of a statute, already clear on its face. In the end, it is for the Legislature, not the courts, to amend the incidental-to-air statute, *should it see fit*. *United States v. Granderson*, 511 U.S. 39, 68, 114 S.Ct. 1259 (1994). Until that time, *should it come*, the incidental-to-air statute is clear and requires no interpretation: the DOT does not have jurisdiction (economic or otherwise) over ground transportation which is incidental to a passenger's travel by air.[14]

Insofar as Petitioners claim that their localized airport-to-seaport passenger shuttle service is transportation congressionally excluded from DOT jurisdiction, via 49 U.S.C. § 13506(a)(8)(A), and thus outside the reach of the DOT for purposes of the FLSA's motor carrier exemption, this case is one of first impression. Given the far-reaching impact the lower courts' rulings will undoubtedly have on virtually hundreds of thousands of persons engaged in

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[14] While courts may believe that Congress intended a result different from that clearly prescribed by 49 U.S.C. § 13506(a)(8)(A) when it drafted the legislation, "[i]t is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." *Granderson*, 511 U.S. at 68. "If Congress enacted into law something different from what it intended, then [Congress] should amend the statute to conform it to its intent." *Lamie*, 540 U.S. at 542.

wholly localized transportation of airport passengers, it is imperative that this Court address the issue. Allowing courts to transcend the plain language of the exceptions from DOT jurisdiction for purposes of employing the motor carrier exemption serves to sanction courts' recent proclivity towards expanding the exemptions to the FLSA – an Act already fraught with exemptions – and permit employers to circumvent the FLSA's overtime pay mandate.

## III. THIS COURT SHOULD CONSIDER THIS CASE TO DETERMINE WHETHER APPLYING THE MOTOR CARRIER EXEMPTION TO PRECLUDE OVERTIME RATE PAY FOR EMPLOYEES ENGAGED IN PURELY LOCAL, WHOLLY IN-STATE TRANSPORTATION FURTHERS THE PURPOSE OF THE FAIR LABOR STANDARDS ACT OR THE MOTOR CARRIER ACT.

This Court long ago recognized that the purpose of the FLSA's overtime wage provision was not to altogether prohibit working excess hours, but to financially pressure employers to reduce employee hours, while at the same time spreading employment. *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 577-78, 62 S.Ct. 1216 (1942), *superseded by statute on other grounds*. "In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from

the beginning." *Id.* at 578. Congress therefore concerned itself with a pervasive problem in many industries – "the evil of 'overwork'" – and thus produced legislation premised upon employee "protection from excessive hours", by statutorily providing a limitation on hours (40) which Congress determined was reasonable. *Id.*

When discussing the initial codification of the Motor Carrier Act of 1935, legislators specifically considered including therein a provision limiting the hours of service for employees of carriers. *See* John J. George, *The Federal Motor Carrier Act of 1935*, 21 CORNELL LAW QUARTERLY 265 (1935-36). The centerpiece of their concern was for a more humane treatment of employees who were then working upwards of 18 to 20 hours a day: "'Drivers' drowsiness' appears a potent cause of highway accidents and the contention is ably made that such a cause inevitably results from the lengthy hours to which truck and bus drivers are subjected." *Id.* While proponents of the inclusion of a provision statutorily limiting driver hours reasoned that excessive hours have deleterious effects on drivers, and that these exhausted drivers present a "serious endangering of life on the highways", *id.* at 266, those opposing a statutory limitation of driver hours argued that the "particular demands of truck and bus operation preclude a rigid schedule of hours". *Id.* Ultimately, the opponents prevailed and the MCA was passed with no provision limiting the number of driver hours of service.

As legislative history recounts, the MCA was intended to regulate the over-the-road or long-haul trucking/busing industries which were under tremendous constraints to timely deliver cargo (due to spoilage issues and the like) or passengers traveling great distances, in order to compete with the already regulated cross-country railroads. Certainly, drivers of inner-city shuttles, running purely localized service, did not face these same issues requiring them to expend "100-120 hours [working] with only 2 or 3 hours of rest." *Id.* at 265.

The goals of the MCA and the FLSA, and the legislative purpose behind the Acts, are not inconsistent.[15] Rather, both Acts' objectives are aligned – protecting workers from excessive hours, in order to promote the health and safety of workers for the good of the public at large. *See Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48, 63 S.Ct. 917 (1943) (identifying as a consideration of the MCA, "[s]afety through establishment of maximum hours for drivers"); *see also Overnight Motor*, 316 U.S. at 578. Moreover, the FLSA's overtime wage mandate *furthers the purpose*

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[15] The alleged competing interests of the DOT and the DOL, with regard to regulation of employees' hours, is recognized to have arisen from a reference in this Court's *Levinson* opinion; however, it is also noted that even the *Levinson* Court "did not show any inconsistency" between the MCA's safety program and the overtime requirements of the FLSA. *See Labor Law – Inapplicability of The Fair Labor Standards Act of 1938 to Employees Within The Scope of The Motor Carrier Act of 1935*, 1 VANDERBILT LAW REVIEW 306, 308, n.11 (1947-48).

of the MCA by financially incentivizing employer carriers to curb drivers' hours of service to 40 per week, rather than the 70 hours per week allotted by the MCA,[16] which carriers remain unmotivated to enforce.[17]

Our Legislature appears to have begun to appreciate that the FLSA's motor carrier exemption was not meant to attach to certain types of transportation. On June 6, 2008, the Legislature enacted the SAFETEA-LU Technical Corrections Act of 2008, which, *inter alia*, modified the FLSA's motor carrier exemption by specifically affirming that the FLSA's overtime provisions apply to employees who drive motor vehicles weighing 10,000 pounds or less and transport eight or less passengers. Pub. L. No.

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[16] Current DOT regulations permit drivers to drive ten hours per day, and work an additional five hours a day in non-driving time, for a total working day of 15 hours; *see* 49 C.F.R. § 395.5(a)(1)&(2); the DOT allows drivers to work up to 70 hours in an eight-day stretch, *id.* at § 395.5(b)(2) – *far from* the 40-hour workweek Congress deemed reasonable under the FLSA.

[17] As one former driver explains, drivers are routinely made to falsify their driver logbooks to reflect fewer hours than actually worked, in order that they may continue to work beyond that allotted by federal and state departments of transportation. *See* Pat Michael, *Asleep At the Wheel: What's Wrong With Trucking*, http://www.newbiedriver.com/articles/WhatsWrongWithTrucking.htm. If the financial pressure contemplated by the FLSA's overtime wage provision were applied to motor carriers, there can be no doubt that carriers would rise to their charge of keeping track of, and strictly enforcing restrictions on, drivers' hours of service, thus achieving the safety objectives of both the FLSA and the MCA. *Id.*

110-244, § 306(a)&(c), 122 Stat. 1620 (2008). In doing so, Congress thus has distinguished between light-weight transportation, impliedly local in nature, and heavyweight trucks and buses which, by their nature, are meant for longer, cross-border transportation. While it may not be practicable to limit long-haul delivery drivers to 40 hours per week, such a limitation is certainly feasible for local shuttle drivers.

Petitioners do not herein ask this Honorable Court to change or amend the FLSA's motor carrier exemption. Petitioners ask only that the Court implement the existing statutes, relative thereto, in accordance with their plain language – 49 U.S.C. § 13501's statutory limitation to transportation which runs across a state line – and in conformity with the original legislative intent that worker safety be paramount. There is no reason to go beyond the clear wording of the statutes, particularly when an expansive interpretation of the statutes does not conform with legislative intent. To date, no court has provided any reason for the current practice of ignoring the plain language of § 13501 to deny drivers of wholly intrastate, purely local transportation their overtime pay under the auspices of the motor carrier exemption. "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people." *A.H. Phillips*, 324 U.S. at 493. Likewise, no court has yet attempted to square a 70-hour workweek for drivers of local

ground shuttle services with the health and safety concerns of the legislature in enacting either the FLSA or the MCA. "To read the FLSA blindly, without appreciation for the social goals Congress sought, would also do violence to the FLSA's spirit." *Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1364 (11th Cir. 1997).

The subject rulings of the lower courts will be touted by virtually thousands of motor carriers nationwide to initiate and support the denial of overtime rate pay to countless employees whose duties are strictly local in nature, and will subject local drivers, as a requirement of their job, to work well in excess of forty hours per week, presenting an obvious and unnecessary danger to the general public. This case presents the very opportunity for this Honorable Court to render an opinion finding that the subject statutes should be strictly construed, in accordance with their plain language and the social goals upon which they were premised, in order to avoid such a glaring inequity.

## CONCLUSION

For the reasons advanced, Petitioners most respectfully ask the Supreme Court of the United States to grant review of this Petition.

Respectfully submitted,

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575 F.3d 1221

United States Court of Appeals,
Eleventh Circuit.

Elmo WALTERS, Alix Provence, Charlene Blackshear, Cedric Jordan, and all others similarly situated, Plaintiffs-Appellants,

v.

AMERICAN COACH LINES OF MIAMI, INC., a Florida corporation, Defendant-Appellee.

**No. 08-15636.**

July 23, 2009.

Robert Ader, Elizabeth B. Hitt, Law Offices of Robert Ader, P.A., Miami, FL, for Plaintiffs-Appellants.

Richard D. Tuschman, Michael W. Casey, III, Kevin E. Vance, Epstein, Becker, Green, P.C., Miami, FL, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before DUBINA, Chief Judge, and BIRCH and WILSON, Circuit Judges.

PER CURIAM:

This appeal requires us to determine whether Appellants, who are all current or former bus drivers for American Coach Lines of Miami ("ACLM"), are subject to a provision in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, exempting from the FLSA's overtime requirements any employees who fall under the jurisdiction of the Secretary of Transportation under the Motor Carrier Act ("MCA").

The district court found Appellants to be eligible for this "motor carrier" exemption and therefore granted the portion of ACLM's motion for summary judgment addressing Appellants' claims for overtime wages. After reviewing the record and the parties' briefs and hearing oral argument, we AFFIRM the grant of summary judgment.

## I. BACKGROUND

ACLM is a private motor carrier providing for-hire ground transportation for passengers that holds itself out to be an "interstate" motor carrier. It is licensed with the United States Department of Transportation ("DOT"), holds all the authorizations from the Federal Motor Carrier Safety Administration ("FMCSA") necessary to be an interstate passenger motor carrier, and has been issued a DOT number. Since 2004, federal transportation agencies have audited ACLM at least twice, on at least one occasion in combination with Florida authorities. ACLM also requires its drivers to meet DOT safety standards, which Florida has adopted as well. *See* Fla. Stat. § 316.302. ACLM does not pay its drivers overtime wages.

ACLM primarily provides transportation within the state of Florida, though some of its business is between Florida and other states. Much of ACLM's revenue comes from shuttling cruise ship passengers between the Miami and Fort Lauderdale airports and local hotels and cruise ship ports. Since September

2006, ACLM has had a written contract to be the sole provider of such transportation for Royal Caribbean Cruise Lines ("Royal Caribbean") during daytime hours. ACLM asserts that between April 2006 and December 2007 it transported more than 500,000 Royal Caribbean passengers, trips that resulted in over $4.4 million in revenues. Appellants contend that there is no proof that ACLM provided such transport prior to September 2006, though they appear not to dispute the total revenue figure. In addition to this written arrangement with Royal Caribbean, ACLM maintains that it earned over $700,000 from earlier informal agreements to provide similar shuttle transportation for Costa Cruises and Princess Cruises. Appellants likewise dispute the existence of such arrangements.

Under ACLM's contract with Royal Caribbean, it provides ground transportation for passengers who book vacation packages through travel agents or Royal Caribbean. For those passengers, ground transportation is included as part of the overall package and is not priced or itemized separately. Passengers who do not pre-purchase ground transportation can request shuttle service when they arrive at the airport or cruise ship terminal, which will then be charged to that passenger's Royal Caribbean account.[1] Under the agreement, Royal Caribbean

[1] We can find nothing in the record stating whether a copy of the passenger's bill for this account would contain a separate price or listing for this charge.

provides ACLM with weekly manifests listing the expected time, date, and number of passengers for each shuttle trip. Royal Caribbean employees greet passengers on arrival, contact ACLM when a bus is required, and collect vouchers from passengers before they board the bus. Royal Caribbean does not keep the vouchers nor does it give them to ACLM; rather, it gives ACLM a "load slip" with a head count for each trip. ACLM then uses these load slips to invoice Royal Caribbean for the trips. The agreement stated that ACLM would receive payment only if a passenger actually boarded the bus, with Royal Caribbean deciding whether to pay based on a per-person or per-bus rate.[2] As a result, ACLM receives all of its payments from Royal Caribbean, rather than the passengers.

In addition to these local shuttle services, ACLM also provided other forms of in-state and out-of-state motor coach transportation, including driving shuttle bus routes at the University of Miami. Between 2004 and 2007, ACLM drivers made at least 148 trips that involved out-of-state travel, some for as long as 90 days.[3] Both parties agree that approximately $1.7

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[2] In February 2008, the parties amended the agreement so that Royal Caribbean would guarantee ACLM a minimum number of passengers per bus and would pay ACLM at a reduced rate for each passenger below this minimum.

[3] ACLM and the district court both cited the 148-trip figure, though there appear to be 150 out-of-state trips listed on the spreadsheet provided by ACLM. The discrepancy may reflect the fact that two entries are missing some data.

million, or 4.06% of ACLM's total revenue during that period, came from these out-of-state trips and that about 19% of its drivers made such trips.[4] There appear to have been 75 ACLM drivers who made out-of-state trips during the time frame, which constitutes 19.08% of the 393 drivers employed by ACLM for that period.[5] Nine of the 63 Appellants (14.29%) made out-of-state trips for ACLM, and Appellants spent less than 286 days on such trips during the period in question.[6] ACLM does not keep records of how many trips its drivers make on a daily or annual basis, and there is no solid evidence regarding how many overall trips ACLM drivers made between 2004 and 2007 nor of what percentage of those trips involved out-of-state travel. One ACLM executive agreed that 10,000 total trips a year would be a reasonable estimate. He stated that, if this estimate were correct, then around 100 of those trips would involve out-of-state travel, which would mean that

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[4] According to our calculations, the percentage of revenue from these trips ranged from a low of 1.40% in 2004 to a high of 7.93% in 2005.

[5] The district court cited a figure of 74 drivers, but both parties appear to agree that 75 is correct. In any event, the lower figure would be 18.83% of ACLM's total workforce, so the net effect of this discrepancy is negligible.

[6] Of those Appellants who were employed by ACLM for more than a year, 6 of 23, or 26.09%, made such trips.

approximately 1% of ACLM's total trips were out of state.[7]

In August 2007, three ACLM drivers brought suit against ACLM in the United States District Court for the Southern District of Florida. They alleged that ACLM had violated the FLSA's minimum wage and overtime provisions and Florida's whistleblower act. In December of that year, a fourth named plaintiff joined the suit, and the district court conditionally certified the class of all drivers employed by ACLM from 6 August 2004 to the present, a class that eventually comprised 63 plaintiffs.[8] Both parties filed motions for summary judgment. The drivers moved for partial summary judgment on, *inter alia*, the applicability of the motor carrier exemption, whereas ACLM moved for summary judgment on all of the claims. In ACLM's motion, it asserted that, as a

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[7] Appellants attempt to assert that the actual percentage should be 0.25% or less, a figure based on a total number of trips that they derived by multiplying the ACLM executive's estimate of the number of buses on the road each day by the number of days in a year. This calculation would be accurate only if each bus averaged one trip per day. There is no evidence to support that inference since some out-of-state trips lasted more than one day and ACLM has not indicated how many shuttle runs it conducts per day. However, if one assumed that the 10,000 trip-a-year estimate was reasonable for 2007, then the 58 out-of-state trips actually taken that year would constitute about 0.6% of ACLM's total for the year.

[8] A total of 60 drivers decided to opt in to the case, although one later voluntarily dismissed his claim, leaving a total of 63 plaintiffs.

motor carrier, it was exempt from the overtime requirements of the FLSA and thus did not have to pay overtime to the employees.

The district court granted in part and denied in part the parties' respective summary judgment motions. The court found that all of the drivers, with the exception of those who predominately drove shuttle bus routes at the University of Miami, were exempt from the FLSA's overtime requirements by virtue of the motor carrier exemption.[9] It therefore granted ACLM's summary judgment motion with respect to the motor carrier exemption for the non-shuttle bus drivers. The drivers moved for reconsideration of the order, which the court denied. The court then entered final judgment against the non-shuttle bus drivers on their overtime claims. Appellants appealed that portion of the order granting in part ACLM's motion for summary judgment on the issue of whether it was eligible for the motor carrier exemption.

## II. DISCUSSION

We review a district court's grant of summary judgment *de novo*. *See Waters v. Miller*, 564 F.3d 1355, 1356 (11th Cir.2009). In conducting our review, we

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[9] The district court denied ACLM's summary judgment motion with respect to the shuttle bus drivers. That decision is not a part of this appeal.

construe all facts and draw all reasonable inferences in favor of the non-moving party. *See id.*

A. *"Motor Carrier" Exemption*

The FLSA requires employers to pay employees at time-and-a-half for any time worked in excess of forty hours per week. *See* 29 U.S.C. § 207(a)(1). However, the act specifically exempts from this requirement "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of" the MCA. *Id.* § 213(b)(1). Congress created this exemption to eliminate any conflict between the jurisdiction exercised by the Department of Labor ("DOL") over the FLSA and the mutually exclusive jurisdiction exercised by the DOT over the MCA. *See Spires v. Ben Hill County,* 980 F.2d 683, 686 (11th Cir.1993). Because of this congressional intent, the Secretary of Transportation does not have to exercise the authority granted to him by the MCA for the motor carrier exemption to be applicable; instead, his power to regulate under the act merely needs to cover a particular group of employees. *See id.*

We construe FLSA exemptions narrowly against the employer.[10] *See Jeffery v. Sarasota White Sox, Inc.,*

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[10] ACLM insists that this principle of construction should not apply to the motor carrier exemption because Congress intended that exemption to draw a boundary between the

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64 F.3d 590, 594 (11th Cir.1995) (per curiam). The employer bears the burden of showing its entitlement to the exemption. *See id.* The Secretary of Transportation has authority under the MCA "to regulate the maximum hours of service of employees who are employed (1) by a common carrier by motor vehicle; (2) engaged in interstate commerce; and (3) whose activities directly affect the safety of operations of such motor vehicles." *Spires,* 980 F.2d at 686; *see also* 49 U.S.C. § 31502(b)(1); 29 C.F.R. § 782.2(a). The MCA indicates that the Secretary has this power for, *inter alia,* all transportation described in 49 U.S.C. § 13501. *See* 49 U.S.C. § 31502(a)(1). Section 13501 in turn provides the Secretary with jurisdiction "over transportation by motor carrier" in various contexts, including between places in different states, between places in the same state if the transport passes through another state, and between the United States and a foreign country to the extent that the transportation occurs in the United States.[11] *Id.*

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jurisdictions of the Secretaries of Transportation and Labor. It contends that a narrow construction of the exemption would impermissibly restrict the Secretary of Transportation's MCA jurisdiction. However, ACLM cites no cases supporting an alternate rule, and the case it references for the notion of mutual exclusivity explicitly construed the exemption narrowly. *See Spires,* 980 F.2d at 689. We therefore see no reason to depart from the traditional rule.

[11] For the period in question, the term "motor carrier" was defined as "a person providing commercial motor vehicle (as defined in [49 U.S.C.] section 31132) transportation for compensation." *Id.* § 13102(14) (2007). Section 31132 defines "commercial

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§ 13501(1)(A), (B), (E). The motor carrier exemption applies only to those employees over whom the Secretary of Transportation has this authority. *See* 29 C.F.R. § 782.2(a).

The applicability of the motor carrier exemption "depends both on the class to which his employer belongs and on the class of work involved in the employee's job." *Id.* There are two requirements for an employee to be subject to the motor carrier exemption. First, his employer's business must be subject to the Secretary of Transportation's jurisdiction under the MCA. *See Baez v. Wells Fargo Armored Serv. Corp.*, 938 F.2d 180, 181-82 (11th Cir.1991) (per curiam); *id.* Second, the employee's business-related activities must "directly affect[ ] the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act." *Baez*, 938 F.2d at 182; *see also* 29 C.F.R. § 782.2(a). We address these prongs in turn.

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motor vehicle" as any "self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property" that was "designed or used to transport more than 8 passengers (including the driver) for compensation." *Id.* § 31132(1)(B).

B. *Secretary's MCA Jurisdiction over ACLM*

For the first prong to be met, ACLM's bus service must be subject to the Secretary of Transportation's jurisdiction under the MCA. There are a number of facts here to support such a finding. Most importantly, ACLM was licensed by the DOT, has the FMCSA authorizations necessary to be an interstate motor carrier, and was audited in the past by the DOT. As we have previously noted, the fact that a company holds these kind of authorizations indicates that the DOT has exercised jurisdiction over it. *See Baez,* 938 F.2d at 182 (noting that the fact that the Interstate Commerce Commission, which had authority over the MCA at the time, issued a permit to a company indicated that MCA jurisdiction already had been exercised over that company). Additionally, ACLM provided bus service that crossed state lines and derived about 4% of its revenue from those trips. It also held itself out as an interstate motor carrier.[12]

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[12] We acknowledge that the current version of the MCA no longer contains language indicating that a company is subject to the act if it "holds itself out to the general public" as an interstate motor carrier. 49 U.S.C. § 303(a)(14) (1976); *see Brennan v. Schwerman Trucking Co. of Va., Inc.,* 540 F.2d 1200, 1204 (4th Cir.1976) (finding that party was subject to the Secretary's MCA jurisdiction because it "at all times relevant hereto held itself out as" an interstate motor carrier). It may be true, as Appellants contend, that this change reflects Congress' intent to eliminate the possibility of the Secretary exercising jurisdiction solely based on that factor. Nevertheless, we do not think it completely eliminates our ability to consider what we deem a relevant, albeit non-dispositive, factor.

Appellants contend that a carrier must engage in more than *de minimus* interstate commerce to fall under the Secretary's jurisdiction and that ACLM's small number of interstate trips would not meet this standard. Appellants' primary authority for such a requirement is *Morris v. McComb,* 332 U.S. 422, 68 S.Ct. 131, 92 L.Ed. 44 (1947). In that case, the Supreme Court found a business to be subject to MCA jurisdiction when about 3.65% of its total trips stemmed from interstate commerce, along with 4% of its revenues. *See Morris,* 332 U.S. at 427, 433-34, 68 S.Ct. at 133, 136-37. They also cite a number of other district court cases imposing similar requirements. *See, e.g, Rossi v. Associated Limousine Servs., Inc.,* 438 F.Supp.2d 1354, 1361 (S.D.Fla.2006). On the whole, these cases suggest that a company's interstate business is *de minimus* if it constitutes less than one percent of the overall trips taken by the company. *See Turk v. Buffets, Inc.,* 940 F.Supp. 1255, 1261-62 (N.D.Ill.1996) (summarizing cases).

The *de minimus* requirement may be inapplicable to situations such as this, where the company has the appropriate federal licensing and there is undisputed proof of some transportation that crosses state lines. We can find no cases indicating that this evidence, by itself, would not be enough to meet the prong. Assuming *arguendo* that there is such a requirement, we find ACLM to have met it. In analyzing the *de minimus* question, we find it pertinent to consider both the number of interstate trips made and the percentage of revenue the company earned

from those trips. *See Garcia v. Fleetwood Limousine, Inc.*, 511 F.Supp.2d 1233, 1238 (M.D.Fla.2007). Although *Morris* principally focused on the number of trips made, we believe the amount of revenue derived from those trips is likewise indicative of the degree to which a business involves interstate transportation. *See Morris*, 332 U.S. at 433-34, 68 S.Ct. at 137. In this case, the actual number of trips that indisputably crossed state lines is relatively small, but the percentage of revenues derived from those trips, 4.06%, is virtually identical to that which the Supreme Court deemed sufficient to create MCA jurisdiction in *Morris*.[13] We find this equivalency adequate to justify the same conclusion with respect to ACLM. We therefore find that ACLM has met the first prong of the exemption test.

### C. *Secretary's MCA Jurisdiction over Appellants' Work-Related Activities*

Having found that the Secretary of Transportation has jurisdiction over ACLM, we turn to the question of whether the Secretary's jurisdiction also encompasses Appellants' work-related activities. As previously noted, this would be the case only if they were "engag[ing] in activities of a character directly

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[13] Appellants question ACLM's statements about its actual revenues, which they assert reflect "turn-around" runs that involved driving empty buses to and from a location. However, as the district court noted, Appellants have not offered a legal rationale for excluding these revenues.

affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act." 29 C.F.R. § 782.2(a). The parties do not dispute that Appellants engaged in activities of a character that directly affected the safety of operation of motor vehicles. We thus need to determine whether these activities constituted "interstate commerce" as that term is understood in the MCA.

The DOL's regulations indicate that the definitions of the MCA itself determine what constitutes transportation in interstate or foreign commerce sufficient to bring an employee within the Secretary of Transportation's purview. *See* 29 C.F.R. § 782.7(a). The MCA and FLSA do not have identical conceptions of what constitutes interstate commerce. *See id.* However, to make enforcement easier, the regulations assume that a movement that would constitute interstate commerce under the FLSA would likewise constitute interstate commerce under the MCA, "except in those situations where the [Interstate Commerce] Commission has held or the Secretary of Transportation or the courts hold otherwise." *Id.* § 782.7(b)(1). Accordingly, if "it has been authoritatively held that transportation of a particular character within a single State is not in interstate commerce" under the MCA, there would be no motor carrier exemption even if the facts established a "'practical continuity of movement' from out-of-State

sources," which would constitute interstate commerce under the FLSA. *Id.*

Courts are "guided by practical considerations" in determining whether an employee's activities would be part of interstate commerce for purposes of the FLSA. *Marshall v. Victoria Transp. Co., Inc.*, 603 F.2d 1122, 1123 (5th Cir.1979) (quotation marks and citation omitted). "When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character."[14] *United States v. Yellow Cab Co.*, 332 U.S. 218, 228, 67 S.Ct. 1560, 1566, 91 L.Ed. 2010 (1947), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). As a result, purely intrastate transportation can constitute part of interstate commerce if it is part of a "continuous stream of interstate travel." *Chao v. First Class Coach Co., Inc.*, 214 F.Supp.2d. 1263, 1272 (M.D.Fla.2001). For this to be the case, there must be a "practical continuity of movement" between the intrastate segment and the overall

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[14] Although *Yellow Cab* involved a Sherman Anti-Trust Act claim, courts have looked to it for guidance regarding the scope of interstate movement under different statutes including the MCA. *See, e.g., Packard v. Pittsburgh Transp. Co.*, 418 F.3d 246, 256-57 & n. 10 (3d Cir.2005). If anything, *Yellow Cab*'s conception of interstate commerce may be more restrictive than that applicable for FLSA claims. *See Marshall*, 603 F.2d at 1124.

interstate flow. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568, 63 S.Ct. 332, 335, 87 L.Ed. 460 (1943); *see also Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 223 (2d Cir.2002) (applying this standard in analyzing applicability of motor carrier exemption).

In *Marshall*, we addressed a city bus service in Brownsville, Texas, which often transported people who had walked across the Mexican border before boarding the bus. *See Marshall*, 603 F.2d at 1123-24. We characterized the transportation of people making international journeys as "a regular, recurring and substantial part" of the bus drivers' overall workload. *Id.* at 1125. Because the drivers' work thereby was "entwined with a continuous stream of international travel," we concluded that the drivers were engaged in interstate commerce, even though their routes were solely intrastate.[15] *Id.* The Supreme Court

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[15] We reached a similar conclusion in a case addressing "interstate commerce" in the context of the Commerce Clause. *See Executive Town & Country Servs., Inc. v. City of Atlanta*, 789 F.2d 1523 (11th Cir.1986). That case involved an airport limousine service, which transported out-of-state or international passengers who had arranged for pick-up, along with local residents who had not made such arrangements. *See id.* at 1525-26. We noted that taxicab service from the airport generally would not be part of the stream of interstate commerce because it would play only a minor role in the taxicab company's overall business. *See id.* However, we found that this particular service did form part of that stream because the pre-arranged nature of the rides meant that 90% of its passengers were making interstate journeys of which the wholly intrastate cab rides were part of a continuous stream. *See id.*

reached a similar conclusion in *United States v. Capital Transit Co.*, 338 U.S. 286, 70 S.Ct. 115, 94 L.Ed. 93 (1949). That case involved a bus service that drove routes within the District of Columbia that took commuters to locations where they then could board buses bound for Virginia. *See id.* at 288, 70 S.Ct. at 116. The Court found that the Interstate Commerce Commission ("ICC") had regulatory authority under the MCA over those intra-district bus routes because they were "part of a continuous stream of interstate transportation" and thus formed "an integral part of an interstate movement." *Id.* at 290, 70 S.Ct. at 117.

These cases indicate that ACLM's airport-to-seaport routes would come under the Secretary's MCA jurisdiction. Its shuttle trips share a practical continuity of movement with the interstate or international travel of the cruise lines and their passengers, just as the Brownsville bus routes did for their riders' cross-border journeys. For cruise ship passengers arriving at the airport or seaport, ACLM's shuttle rides would be part of the continuous stream of interstate travel that is their cruise vacation. The Royal Caribbean patrons in particular would have no reason to have any alternate view since the fee for the shuttle ride would either be bundled as part of their cruise vacation package or would be included on the bill for their Royal Caribbean shipboard account.

### D. *Possible Limitations on Secretary's MCA Jurisdiction*

Appellants make three arguments as to why we should find ACLM not to have met the second prong, which we address in turn. First, they maintain that we should not read the motor carrier exemption as applying to "interstate commerce" when that term does not appear in the relevant statute. Second, they assert that the Secretary is divested of jurisdiction over ACLM's airport-to-seaport routes by the "incidental-to-air" exemption, 49 U.S.C. § 13506(a)(8)(A). Third, they contend that those routes could constitute interstate commerce only if there was a through-ticketing arrangement between ACLM and an air carrier.

#### 1. *Statutory Text*

Appellants assert that the applicability of the motor carrier exemption should be governed by the plain text of the statutes. They maintain that this language specifically limits the Secretary's MCA transportation solely to transportation that actually crosses state lines. *See* 49 U.S.C. § 13501(1). According to Appellants, this is the only permissible interpretation of the Secretary's jurisdiction, particularly in light of our dictate to narrowly construe FLSA exemptions, and that the airport-to-seaport routes would not qualify as interstate under this rationale.

We decline to adopt such a restrictive reading. Courts consistently have interpreted the scope of

MCA exemptions using the "interstate commerce" understanding. *See, e.g., Bilyou,* 300 F.3d at 223; *Foxworthy v. Hiland Dairy Co.,* 997 F.2d 670, 672 (10th Cir.1993). In fact, the only authority Appellants can cite for their reading, apart from the statutory text itself, is a concurring opinion in a Third Circuit case, which no court since has followed. *See Packard,* 418 F.3d at 259-60 (Nygaard, J., concurring in judgment). Moreover, that rationale is at odds with our past cases finding MCA exemptions to apply to workers whose activities involved exclusively intrastate transportation or handling of goods that were bound for out-of-state destinations. *See Baez,* 938 F.2d at 181-82 (finding armored car drivers who made intrastate deliveries of checks which ended up outside the state to be subject to motor carrier exemption); *Galbreath v. Gulf Oil Corp.,* 413 F.2d 941, 942, 947 (5th Cir.1969) (finding that motor carrier exemption applied to drivers who performed solely intrastate transportation of petroleum products that originated out-of-state). Additionally, the DOL's own regulations appear to support applying the exemption to situations in which the activity at issue does not involve interstate transit.[16] *See* 29 C.F.R. § 782.7(b)(1) (noting that "it will ordinarily be assumed . . . that the interstate commerce requirements of the section 13(b)(1)

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[16] Appellants have cited no decisions, other than the *Packard* concurrence, holding to the contrary, so there is no reason to think that the FLSA's conception of interstate commerce would not apply. *See* 29 C.F.R. § 782.7(b)(1).

exemption are satisfied" when the employee's intrastate transportation "is part of an interstate movement of the goods or persons being thus transported so as to constitute interstate commerce within the meaning of the Fair Labor Standards Act").

2. *"Incidental-to-Air" Exemption*

Appellants also contend that, even if the airport-to-seaport routes would be considered part of interstate commerce, Congress divested the Secretary of Transportation of jurisdiction over those routes by enacting the "incidental-to-air" exemption, 49 U.S.C. § 13506(a)(8)(A). That provision states that "[n]either the Secretary nor the Board has jurisdiction under this part over . . . transportation of passengers by motor vehicle incidental to transportation by aircraft." 49 U.S.C. § 13506(a)(8)(A). DOT regulations provide that such transport would be "incidental" if it is limited to those passengers "who have had or will have an immediately prior or immediately subsequent movement by air" and if it occurs entirely within a 25-mile radius of the airport. 49 C.F.R. § 372.117(a).

Appellants argue that this exemption divests the Secretary of jurisdiction under § 13501 over ACLM, because that statute is the only provision under that subpart of Title 49 to address jurisdictional issues. Since the applicability of the motor carrier exemption depends on whether the Secretary has power over a motor carrier under § 13501, this reading would

mean that the incidental-to-air exemption would make the motor carrier exemption inapplicable to ACLM. *See* 49 U.S.C. § 31502(a)(1). The parties do not dispute that ACLM's airport-to-seaport drives would fall under the terms of the incidental-to-air exemption because the drives all are immediately prior or subsequent to air travel and occur within a 25-mile radius of the airport. The only issue we must decide is whether the exemption would bar the Secretary from exercising jurisdiction over ACLM with respect to FLSA issues, which would thereby make the motor carrier exemption inapplicable to the company.

As the district court noted, Appellants' argument appears to be at odds with the plain language of the statute. Though 49 U.S.C. § 31502(a)(1) references § 13501 to determine the scope of the Secretary's authority under the MCA, it does so only to indicate to what transportation the MCA applies. *See id.* There is no indication that this provision is meant to incorporate anything other than the descriptions of transportation contained in § 13501. Any exemptions to § 13501 would therefore seem to be irrelevant. This reading is supported by the fact that § 31502(a) also cites 49 U.S.C. § 13502, which contains a specific carve-out from the Secretary's jurisdiction for transportation between Alaska and other states that occurs in a foreign country, but does not reference any other possible jurisdictional exceptions to § 13501. *See id.* §§ 13502, 31502(a)(1).

An examination of the background of the incidental-to-air exemption further indicates that it was not intended to limit the Secretary's jurisdiction over overtime issues. The difficulty in analyzing the scope of the exemption derives from the wording of the current version of the MCA, the parts of which have been amended and separated over the years. The original version of the act specifically stated that the incidental-to-air exemption did not apply to regulations under Section 204 of the MCA that discussed such topics as maximum hours.[17] *See id.* § 303(b)(7a) (1948 ed.); *see also Bingham v. Airport Limousine Serv.*, 314 F.Supp. 565, 570 (W.D.Ark.1970) (noting that the exemption did not limit the Secretary's authority under the MCA to impose hours and safety regulations). However, Congress later revised the statute and removed the references to Section 204 and wage and hour issues. The current version now discusses eliminating the Secretary's jurisdiction under "this part." *Id.* § 13506(a)(8)(A).

No court appears to have addressed the scope of this specific exemption, but a number have examined

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[17] That version stated:

> Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . the transportation of persons or property by motor vehicle when incidental to transportation by aircraft.

*See* 49 U.S.C. § 303(b)(7a) (1948 ed.).

similarly worded MCA exemptions. In *Bilyou*, for example, the Second Circuit examined the legislative history of 49 U.S.C. § 13505, which divested the Secretary of jurisdiction under "this part" over transportation unrelated to a primary business. 49 U.S.C. § 13505; *see Bilyou,* 300 F.3d at 225-29. Based on the court's examination, it found that the provision addressed solely economic matters and therefore did not limit the Secretary's jurisdiction over issues relating to safety and hours. *See Bilyou,* 300 F.3d at 226. The court also commented that § 31502 is in a different part of the MCA from the exemption at issue and that the jurisdictional limitation imposed by that exemption would not impact the Secretary's authority under § 31502.[18] *See id.*

Appellants cite one case, *Mielke v. Laidlaw Transit, Inc.,* 102 F.Supp.2d 988 (N.D.Ill.2000), reaching a contrary holding, i.e., that such an exemption would eliminate the Secretary's MCA jurisdiction over all matters relating to a particular motor carrier, including with respect to the regulation of hours and safety.[19] *See Mielke,* 102 F.Supp.2d at 990-92. That

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[18] As the Second Circuit noted, at least two other circuits have reached similar conclusions, albeit without engaging in the same examination of legislative history. *See Bilyou,* 300 F.3d at 225 (citing *Klitzke v. Steiner,* 110 F.3d 1465, 1468 (9th Cir.1997); *Friedrich v. U.S. Computer Servs.,* 974 F.2d 409, 413 (3d Cir.1992)).

[19] They contend that we should read *Spires* as supporting this interpretation as well; however, it addressed the motor

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court focused principally on the statutory text and found that the reference to "this part" had to be read as referring to the totality of the Secretary's regulatory power. *See id.* However, no other court appears to have adopted this rationale, and the few that have addressed this issue since *Bilyou* and *Mielke* have followed the interpretation of the former. *See, e.g., King v. Asset Appraisal Servs., Inc.*, 470 F.Supp.2d 1025, 1031-32 (D.Neb.2006).

We likewise find *Bilyou*'s statutory analysis more persuasive than *Mielke*'s. Though the current version of the exemption does not contain specific references to hours and safety regulation, the elimination of that language likely reflects the fact that the separation of the various sections of the MCA rendered the reference to Section 204 meaningless. There is no indication in the legislative history that Congress intended to alter its original view regarding the effect of the incidental-to-air exemption. *See* H.R.Rep. No. 96-1069 at 19 (1980), U.S.Code Cong. & Admin.News 1980, pp. 2283, 2301 (noting that revisions to the exemption were made to reflect the fact that certain kinds of transportation were exempt from economic regulation by the ICC). Furthermore, as the Second Circuit noted, the other subsections of the relevant part of the MCA all appear to be at least tangentially related to matters involving economic regulation,

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carrier exemption in general and did not engage in any form of statutory interpretation. *See generally Spires*, 980 F.2d 683.

such as registration of motor carriers, financial reporting requirements, and merger and acquisition regulation. *See, e.g.,* 49 U.S.C. §§ 13901, 14123, 14303. More importantly, the DOT's own regulations define "exempt motor carriers" as those exempt from economic regulation under § 13506 but still subject to safety regulations, such as maximum hours laws. *See* 49 C.F.R. § 390.5. Accordingly, we find that the incidental-to-air exemption does not eliminate the Secretary's authority to regulate maximum hours under the FLSA.

3. *"Through-Ticketing" Requirement*

Appellants also contend that airport-to-seaport trips cannot constitute interstate commerce unless they are part of a "through-ticketing" arrangement with the airlines or cruise lines. A through-ticketing arrangement involves an agreement "between the motor carrier and the air carrier for continuous passage" of passengers. *In Re Kimball,* 131 M.C.C. 908, 918 (1980). Appellants cite a number of decisions by the Surface Transportation Board ("STB") and ICC, as well as district court cases, in which such an arrangement was required for the Secretary to have jurisdiction over an employer whose business involved such intrastate trips. *See, e.g., Morrison v. Quality Transps. Servs., Inc.,* 474 F.Supp.2d 1303, 1310 (S.D.Fla.2007); *Rossi,* 438 F.Supp.2d at 1362; *Kimball,* 131 M.C.C. at 918; *Motor Transp. of Passengers Incidental to Transp. by Aircraft,* 95 M.C.C. 526, 536 (1964). They maintain that ACLM's relationships

with Royal Caribbean and the other cruise lines do not meet this requirement.

The parties dispute whether the through-ticketing requirement even applies to the second prong of the motor carrier exemption analysis here. The STB and ICC decisions cited by Appellants indicate that a through-ticketing or common arrangement is required for intrastate transportation of airplane passengers to be interstate commerce. *See Kimball*, 131 M.C.C. at 918; *Motor Transp.*, 95 M.C.C. at 536. As ACLM notes, those cases involved disputes over the applicability of the incidental-to-air exemption. *See Kimball*, 131 M.C.C. at 912; *Motor Transp.*, 95 M.C.C. at 529-30, 540. Since that exemption addresses the Secretary of Transportation's jurisdiction over an employer, those decisions may say nothing about whether there would be a similar requirement for employees' activities to be in interstate commerce. Furthermore, since those cases discuss a through-ticketing requirement between a motor carrier and an air carrier, they may be inapplicable to an arrangement between a motor carrier and a cruise line. *See Kimball*, 131 M.C.C. at 918; *Motor Transp.*, 95 M.C.C. at 536. However, at least one district court required a motor carrier to have a through-ticketing arrangement with a non-air carrier to meet the second prong of the analysis.[20] *See*

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[20] Another district court considered the existence of a through-ticketing arrangement during this stage of the analysis,

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*Morrison,* 474 F.Supp.2d at 1310-12. Additionally, our obligation to construe FLSA exemptions narrowly would support requiring such an agreement when there is some dispute about the applicability at this stage of the analysis.

In an abundance of caution, we therefore decline to decide whether a through-ticketing arrangement is necessary and instead look at whether ACLM has established that it has such an arrangement assuming one would be applicable. Appellants maintain that the requirement can be met only if there is a formalized agreement between a motor carrier and an air carrier. However, that approach does not accord with the relevant precedent. In fact, the ICC appears to deem it sufficient that there be some sort of "common arrangement" with an out-of-state carrier, which need not be an air carrier. *See Motor Transp.,* 95 M.C.C. at 536 (discussing requirement that there be a common arrangement with "connecting out-of-State carriers"). Courts generally have followed the ICC's interpretation and found the requirement to be met even when there is no through-ticketing agreement so long as there is evidence of a contractual connection between the motor carrier and the interstate carrier. *See, e.g., Pennsylvania Pub. Util. Comm'n v. United States,* 812 F.2d 8, 11-12 (D.C.Cir.1987) (finding that a motor carrier had a common

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although it did not require it to be present. *See Chao,* 214 F.Supp.2d at 1271-73.

arrangement with an air carrier when it "operated pursuant to an explicit contract" with the airline, and that this was sufficient for the ICC to find the motor carrier's activities to be in interstate commerce, despite the absence of a through-ticketing agreement).

ACLM's relationship with Royal Caribbean would meet this common arrangement requirement. It had a formal agreement with Royal Caribbean since September 2006 to transport passengers between hotels, airports, and seaports. Under this arrangement, ACLM did not operate as an independent part of the cruise passengers' overall transportation, even though it involved a distinct mode of transport from the plane flight and cruise ship. Instead, from the perspective of the cruise passengers, ACLM's trips were an essential and intrinsic component of the overall stream of interstate travel transporting the passengers from their points of departure to the cruise ships (and exotic foreign and out-of-state ports of call) and back home again.

ACLM also has presented sufficient evidence that it had common arrangements with cruise lines prior to September 2006. Though it had no formal contract with a cruise line before that date, it put forward evidence showing that it had arrangements with Princess Cruises and Costa Cruises during that time, that those relationships were similar to that which it now has with Royal Caribbean, and that it earned substantial amounts of revenue from these connections. According to a vice president for ACLM,

these arrangements involved the cruise lines selling pre-arranged tickets for airfare, ground transportation, occasionally accommodation, and the cruise itself. The cruise lines agreed to pay ACLM a fixed amount for its services, which was based on an hourly figure that reflected the market rate at the time.

Appellants contest the existence of any relationship between ACLM and these cruise lines. Notably, though, they do not offer evidence to contradict ACLM's assertions about the nature of its ties with the cruise lines or about the revenue earned from these connections. In the absence of any clear indication that ACLM did not have the relationships it claims, and bearing in mind the evidence ACLM presented, we view it as having established that its ties with the cruise lines were sufficient to constitute a "common arrangement" throughout the period in question. *Compare with Powell v. Carey Int'l,* 483 F.Supp.2d 1168, 1186 (S.D.Fla.2007) (finding no through-ticketing arrangement because the evidence indicated that the relationship was "a loose affiliation between businesses"); *Morrison,* 474 F.Supp.2d at 1310 (denying employer's summary judgment motion regarding applicability of motor carrier exemption in part because the employees contradicted the employer's evidence regarding the terms of its alleged through-ticketing arrangement).

Accordingly, even if a through-ticketing arrangement is required for the airport-to-seaport routes to constitute interstate commerce and thus come under the Secretary's MCA jurisdiction, ACLM has shown

that such an arrangement existed throughout the period in question. Since Appellants have conceded that they reasonably could be expected to drive such routes, we find ACLM to have met the second prong of the motor carrier exemption test.[21] We therefore conclude that the district court correctly granted ACLM's motion for summary judgment with respect to the applicability of that exemption.

## III. CONCLUSION

Appellants contend that the district court erred in granting ACLM's motion for summary judgment with respect to the applicability of the motor carrier exemption. We find ACLM to have provided sufficient evidence both that it was subject to the Secretary of Transportation's jurisdiction under the MCA and that the activities of its employees also fell under the Secretary's MCA jurisdiction. We therefore AFFIRM the district court's grant of ACLM's motion for summary judgment with respect to the motor carrier exemption.

AFFIRMED.

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[21] Because we reach this conclusion on the basis of ACLM's airport-to-seaport routes, we need not address ACLM's alternative argument that the second prong would be met because Appellants reasonably could be expected to drive trips that indisputably crossed state lines.

569 F.Supp.2d 1270

United States District Court,
S.D. Florida.
Elmon WALTERS, Alix Provence, Charlene Blackshear, and all others similarly situated,
Plaintiffs,
v.
AMERICAN COACH LINES OF MIAMI, INC.,
a Florida corporation, Defendant.

**No. 07-22000-CIV.**

July 29, 2008.

Elizabeth B. Hitt, Robert Ader, Law Offices of Robert Ader, P.A., Miami, FL, for Plaintiffs.

Michael W. Casey, III, Richard D. Tuschman, Kevin E. Vance, Epstein Becker & Green, P.C., Miami, FL, for Defendant.

## *ORDER ON MOTIONS FOR SUMMARY JUDGMENT*

URSULA UNGARO, District Judge.

THIS CAUSE is before the Court upon Plaintiffs' Motion for Partial Summary Judgment As to Defendant's Affirmative Defenses Regarding the Motor Carrier Exemption, Statute of Limitations and Liquidated Damages, filed April 17, 2008. (D.E.68.) Defendant filed its Response on May 5, 2008, (D.E.104), to which Plaintiffs replied on May 15, 2008. (D.E.125.) Also before the Court is Defendant's Motion for Summary Judgment, filed April 18, 2008.

(D.E.73.) Plaintiffs filed their Response on May 2, 2008, (D.E.100), to which Defendant replied on May 12, 2008. (D.E.121.) The matters are ripe for disposition.

THE COURT has considered the motions and the pertinent portions of the record and is otherwise fully advised in the premises.

## *BACKGROUND AND FACTS*[1]

Defendant is a motor carrier that provides for-hire ground transportation of passengers. (Def.'s Statement of Material Facts (Def.'s SMF) ¶ 1; Pls.' Statement of Undisputed Facts in Support of their Mot. for Partial Summ. J. (Pls.' SMF) ¶ 1.) Defendant

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[1] Defendant has submitted a statement of material facts in support of its Motion, (D.E.74), and Plaintiffs have submitted a response to Defendant's statement of facts. (D.E.101.) Likewise, Plaintiffs have submitted a statement of material facts in support of their Motion, (D.E.69), and Defendants have submitted a Response to Plaintiffs' statement of facts. (D.E.105.) In addition, Plaintiffs have submitted a statement of material facts in opposition to Defendant's Motion. To the extent that Plaintiffs do not controvert the facts alleged by Defendant and those facts are supported by the record, the Court adopts the facts contained within Defendant's statement. Likewise, to the extent that Defendant does not controvert the facts alleged by Plaintiffs and those facts are supported by the record, the Court adopts the facts contained within Plaintiffs' statement. *See* S.D. Fla. L.R. 7.5.D ("All material facts set forth in the movant's statement filed and supported as required by Local Rule 7.5.C will be deemed admitted unless controverted by the opposing party's statement . . . ").

has been in operation since September 2003. (Def.'s SMF ¶ 1.) Plaintiffs are or were bus drivers for Defendant. (Def.'s SMF ¶ 2; Pls.' SMF ¶ 2.) Defendant pays its drivers using a variety of different methods but does not pay any of them at overtime wage rates. (Pls.' SMF ¶ 1.)

Defendant holds itself out as an "interstate" motor carrier, advertises interstate services, is licensed with the United States Department of Transportation (USDOT), and holds all of the authorizations required of interstate motor carriers of passengers issued by the agency within the USDOT that regulates such carriers, the Federal Motor Carrier Safety Administration (FMCSA). (Def.'s SMF ¶¶ 3 & 5; Pls.' SMF ¶ 1.) Defendant holds operating authority from the FMCSA in the form of an interstate motor common carrier certificate, which gives Defendant authority "to engage in transportation as a common carrier of passengers in charter and special operations, by motor vehicle in interstate or foreign commerce." (Def.'s SMF ¶ 4.) Defendant has been issued a USDOT number by the FMCSA evidencing its right to engage in interstate commerce subject to the FMCSA's safety regulations. (Def.'s SMF ¶ 3.) Defendant requires that its drivers become qualified to drive all types of vehicles used by it for passenger transportation and Defendant maintains a "driver qualification file" for each driver as required by 49 C.F.R. § 391.51(a). (Def.'s SMF ¶ 6.) Defendant is required to comply with the Federal Motor Carrier Safety Regulations (FMCSR), including the hours of service regulations

governing drivers of vehicles used in interstate commerce at 49 C.F.R. Part 395, and to maintain required USDOT records evidencing such compliance. (Def.'s SMF ¶ 3.) Logs and other records are maintained in accordance with the requirements of those rules.[2] (Def.'s SMF ¶ 6.) Defendant's drivers are subject to random drug alcohol testing required by the FMCSR. (Def.'s SMF ¶ 6.)

Defendant provides transportation service between Florida and other states, as well as single-state carriage of persons, including to and from the local seaports and airports, and to and from the seaports to local hotels. (Def.'s SMF ¶¶ 5 & 10; Pls.' SMF ¶ 21 n. 2.) Defendant does not keep records of the number of trips that it makes during a given time frame, *i.e.*, on a daily, weekly, monthly, or yearly basis. (Brittenum Dep. 67 & 116, Dec. 20, 2007; Brittenum Dep. 41, Jan. 14, 2008.) Defendant has provided an estimate that on a given day it may have 100 buses on the road, and that annually it makes approximately 10,000 trips, including to and from airports and seaports, university shuttle routes, and charters. (Brittenum Dep. 67, Dec. 20, 2007; Brittenum Dep. 41, Jan. 14, 2008.)

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[2] However, according to Plaintiffs, the logbooks are not an accurate reflection of the number of hours Plaintiffs actually worked. (Pls.' SMF in Support of their Resp. to Def.'s Mot. for Summ. J. (SMF II) ¶¶ 16-17, 23, 27, 30, 35.)

From August 2004 through December 2007, Defendant made 148 trips across the State line, many of which lasted several weeks and some of which lasted between thirty-five and ninety days. (Def.'s SMF ¶ 7.) These trips across the State line produced over $1.7 million, or 4% of Defendant's total revenues for the period from August 2004 through December 2007.[3] (Def.'s SMF ¶ 7; Pls.' SMF ¶ 12.) Seventy-four

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[3] Plaintiffs wish to subtract from the total revenues derived from trips across the State line during the period from August 2004 through December 2007 the revenue derived from trips to Louisiana made in September and October 2005, and August and November 2006 for purposes of providing hurricane relief in Louisiana. Plaintiffs argue that these trips should not be included in calculating the total revenues derived from trips across the State line during the period from August 2004 through December 2007 because the trips were "anomalous," and because at least some of these trips involved driving across the State line with empty buses, and then either dropping off the buses for third parties to use in providing hurricane relief, or driving passengers within the State of Louisiana.

Plaintiffs have not, however, provided a legal basis for subtracting the revenues derived from the hurricane-related trips to Louisiana. Plaintiffs cite 49 U.S.C. § 13501, which provides in relevant part that the Secretary of Transportation has "jurisdiction [as specified in Part B of Subtitle IV of Title 49] over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both are transported by motor carrier [] between a place in [] a State and a place in another State; [] a State and another place in the same State through another State; . . . [or] the United States and a place in a foreign country to the extent the transportation is in the United States. . . ." 49 U.S.C. § 13501.

As defined by 49 U.S.C. § 13102(14), the motor carrier is the "person providing commercial motor vehicle . . . transportation for compensation." Where the motor carrier dispatches an empty

(Continued on following page)

different drivers out of the 393 drivers employed by Defendant during the period from August 2004 through December 2007 (approximately 18%) made trips across the State line. (Def.'s SMF ¶ 7; Pls.' SMF ¶ 13.) Of those drivers eight have driven across the State line between five and fifteen times, and the remainder average one or two trips each across the State line. (Pls.' SMF ¶ 13.)

According to Defendant, of the sixty-three Plaintiffs in this action, eleven (approximately 17%) have driven across the State line while employed by Defendant, and have spent a total of 286 days on such trips across the State line. (Def.'s SMF ¶ 8; Kelly Decl. ¶ 9 & Ex. B.) Plaintiffs have provided evidence that at least two of the eleven Plaintiffs counted by Defendant never traveled out of the State while employed by Defendant, so the calculation would be adjusted, such that, of the sixty-three Plaintiffs in this action, nine (approximately 14%) have driven across the State line while employed by Defendant, and have spent fewer than 286 days on such trips across the State line. (Pls.' SMF II ¶¶ 6-7; Kelly Decl. ¶ 9 & Ex. B; Burns Aff. ¶¶ 2-3; Smith Aff. ¶¶ 2-3.) Of

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bus from State A into State B in order to transport cargo or passengers between two points in State B, the transportation within State B constitutes interstate commerce. *See* Federal Motor Carrier Safety Administration, Interpretation for Part 390: General, § 390.3 General Applicability, Question 14, *available at* http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.asp?rule_toc=759&section=390.3&section_toc=1738.

the twenty-three Plaintiffs who were employed by Defendant for one year or more during the period from August 2004 through December 2007, six Plaintiffs (26%) drove across the State line while employed by Defendant. (Kelly Decl. ¶ 9 & Exs. B & C; Burns Aff. ¶¶ 2-3.)

Of the Plaintiffs who have driven across the State line while employed by Defendant, there is evidence that four of these Plaintiffs drove empty buses across the State line and did not transport passengers on these trips (Zellner Aff. ¶ 3; Chambers Aff. ¶ 3; Pedrozo Aff. ¶ 3; Sheffield Aff. ¶ 3); two of these Plaintiffs either drove an empty bus across the State line or flew out-of-state, and then remained at their out-of-state destination to drive passengers within that State (Jefferson Aff. ¶ 3; Saunders Aff. ¶ 3); and one of these Plaintiff drivers took two trips across the State line while employed by Defendant, transporting passengers across the State line on one of those trips, and driving an empty bus across the State line on the other trip, remaining there for a few days to drive passengers within that State (Price Aff. ¶ 3).

Defendant was audited by the USDOT, FMSCA on October 18, 2004. (2d Supplemental Brittenum Decl. ¶ 2 & Ex. A.) Defendant also was audited in May 2007 by the FMSCA and the Florida Department of Transportation (FLDOT) to determine compliance

with the FMSCR and State regulations.[4] (Def.'s SMF ¶ 3.) Defendant was cited by the FLDOT for violations of both federal and State regulations, including ninety-five violations regarding drivers' hours of service. (Pls.' SMF ¶ 39.) The violations were found in only a sampling of Defendant's drivers' logbooks. (Pls.' SMF ¶ 39.) During the course of the audit, Sergeant Michael Roberts of the FLDOT determined, based on information provided by Defendant including thousands of randomly sampled driver logbooks, that the majority of Defendant's trips were within the State, and that Defendant conducted a limited number of trips across the State line. (Pls.' SMF ¶¶ 40-42.) During the course of the May 2007 audit, Roberts learned that sixty-seven of Defendant's then-employed drivers did not make any trips across the State line while employed by Defendant, and out of thousands of logbook entries, there were a total of nine trips across the State line during the six-month period preceding the May 2007 audit. (Pls.' SMF ¶ 44.)

On September 1, 2006, Defendant entered into a written contract (the "Transportation Services Agreement") with Royal Carribean Cruise Lines (RCCL) to provide ground transportation services to RCCL cruise line passengers. (Def.'s SMF ¶ 17; Pls.' SMF ¶ 19.) According to Defendant, it began providing

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[4] Florida has adopted federal safety regulations, including those that pertain to driver hours of service contained in 49 C.F.R. Part 395, for intrastate transportation within Florida. Fla. Stat. § 316.302.

ground transportation services to RCCL cruise line passengers in April 2006, approximately five months prior to the September 1, 2006 effective date of the written contract. (Brittenum Decl. ¶ 18(a); Brittenum Supplemental Decl. ¶ 3 & Ex. A.) During the period from April 2006 to December 2007, Defendant has transported more than 500,000 RCCL cruise passengers, yielding revenues in excess of $4.4 million. (Brittenum Decl. ¶ 18(a).) However, according to Plaintiffs, RCCL did not use Defendant for ground transportation services until the Transportation Services Agreement became effective on September 1, 2006. (Trescastro Dep. 7:3-13; 45:1-4, Mar. 6, 2008.)

Defendant is the sole provider of airport-to-seaport and seaport-to-airport ground transportation services for RCCL's passengers during the day; another company provides RCCL's ground transportation services at night. (Brittenum Dep. 191:23-192:11, Jan. 14,2008; Trescastro Dep. 6:10-23.) Under the Transportation Services Agreement between Defendant and RCCL, Defendant provides airport-to-seaport and seaport-to-airport ground transportation for RCCL cruise line passengers to and from Miami and Fort Lauderdale airports to and from the Port of Miami and Port Everglades in Fort Lauderdale. (Pls.' SMF ¶ 21.) The distance between these airports and seaports does not exceed a twenty-five mile radius "as the crow flies," although the distance by road between these airports and seaports is longer than twenty-five miles. (Pls.' SMF ¶ 21; Def.'s Resp. to Pls.' SMF ¶ 21.) Defendant also provides ground transportation for

RCCL cruise line passengers to and from the seaports to local hotels. (Pls.' SMF ¶ 21 n. 22.)

Under the Transportation Services Agreement between Defendant and RCCL, Defendant provides RCCL cruise line passengers ground transportation booked through travel agents or through packages sold by RCCL, which include airfare and ground transportation. (Pls.' SMF ¶ 22.) RCCL also sells hotel packages, which include ground transportation. (Trescastro Dep. 11:17-20.) Approximately 85% of RCCL's bookings are sold through travel agents, and the remaining 15% are sold directly through RCCL. (Pls.' SMF ¶ 22.) If an RCCL cruise line passenger has not pre-booked ground transportation from seaport to airport, passengers can purchase shuttle service vouchers before disembarking. (Pls.' SMF ¶ 23.) Likewise, if an RCCL cruise line passenger has not pre-booked ground transportation from airport to seaport, passengers can, upon arrival at the airport, request shuttle service from an RCCL representative, and the ground transportation will be charged to the passenger's RCCL customer account. (Pls.' SMF ¶ 23.) RCCL sends its cruise line passengers a booklet of "guest vacation documents" describing the cruise itinerary and providing a checklist, information on what to expect on the cruise, the availability of shore excursions, and other information, along with "vouchers" for hotel stays and ground transportation that the passenger has purchased. (Pls.' SMF ¶ 24.)

Under the Transportation Services Agreement, RCCL provides Defendant with weekly shuttle

manifests indicating the date and time of the requested shuttle services, the number of passengers to be shuttled, and the flight and vessel information. (Pls.' SMF ¶ 26.) The manifests are provided to Defendant one week in advance of the requested transport. (Pls.' SMF ¶ 26.) When RCCL cruise line passengers arrive at the airport, they are greeted by RCCL representatives, who have a manifest indicating the names of the RCCL cruise line passengers to be transported by Defendant's drivers. (Pls.' SMF ¶ 27.) Once the RCCL representative has gathered all of the arriving RCCL cruise line passengers upon their arrival at the airport, the RCCL representative contacts Defendant and requests a bus, providing Defendant with the number of RCCL cruise line passengers and the terminal pick-ups. (Pls.' SMF ¶ 28.) Defendant and its drivers are not provided with the RCCL cruise line passenger manifests or with the identity of the passengers it transports. (Pls.' SMF ¶ 26.)

At the airport, RCCL representatives collect ground transportation vouchers from the cruise line passengers and discard the vouchers. (Pls.' SMF ¶ 29.) Defendant does not receive the ground transportation vouchers; instead, RCCL provides Defendant with a "load slip" with a passenger head count. (Pls.' SMF ¶ 29.) Based on the load slip head count, Defendant invoices RCCL at a specific rate for each RCCL cruise line passenger it transports to and from the airport to and from the seaport (Pls.' SMF ¶ 30.) Under their Transportation Services Agreement, RCCL may pay

Defendant at either a per-passenger or a per-bus rate. (Pls.' SMF ¶ 30.) The price RCCL charges its guests for ground transportation is unrelated to the price RCCL pays Defendant for its services. (Pls.' SMF ¶ 31.) There is no price indicated on the RCCL cruise line passengers' ground transportation vouchers; RCCL cruise line passengers are charged a bundled rate, with no line item prices as to the cruise, air transportation, and ground transportation. (Pls.' SMF ¶ 31.) RCCL cruise line passengers' ground transportation vouchers are non-refundable if not used, but passengers may receive an on-board credit for shore excursions. (Pls.' SMF ¶ 32.)

If an RCCL cruise line passenger who has booked and paid for a cruise, air transportation and ground transportation cannot make his or her sailing date, Defendant does not receive any of the revenue RCCL collects from such a passenger; rather under their agreement, Defendant only receives payment from RCCL when Defendant actually transports a passenger, despite the fact that the passenger has paid for ground transportation as part of his or her cruise package. (Pls.' SMF ¶ 32.) In February 2008, Defendant and RCCL amended their Transportation Services Agreement, providing that RCCL would guarantee Defendant a minimum number of passengers it would be transporting, and would pay Defendant at a rate of one-half of the per-passenger price for the number of passengers short of the guaranteed minimum. (Pls.' SMF ¶ 33.)

Under their Transportation Services Agreement, RCCL retained the right to terminate the agreement with one month's notice to Defendant if, in its "sole and absolute opinion" RCCL found Defendant's ground transportation services unsatisfactory. (Pls.' SMF ¶ 35.) Where an RCCL cruise line passenger books a cruise, air and ground transportation far in advance, there is no assurance that the passenger's transportation will be provided by Defendant, as there is no guarantee that the agreement between RCCL and Defendant will be in force at that time. (Pls.' SMF ¶ 35.)

During 2003, 2004, and 2006, Defendant also had arrangements with Costa Cruises and Princess Cruises to provide ground transportation services to Costa Cruises and Princess Cruises passengers who purchased such services. (Brittenum Decl. ¶¶ 18(b)-(c) & Exs. F-G.) No written agreement was entered between Defendant and Costa Cruises or between Defendant and Princess Cruises. (Brittenum Decl. ¶¶ 18(b)-(c).) According to Defendant, its revenues from the arrangement with Costa Cruises exceeded $500,000, and its revenues from the arrangement with Princess Cruises exceeded $200,000. (Brittenum Decl. ¶¶ 18(b)-(c).)

During 2006 and continuing through the present, Defendant also has had arrangements with several independent ground agents to provide ground transportation services to Costa Cruises passengers, Prince Cruise VIP groups, Cunard Cruises passengers, and Crystal Cruises passengers who purchase ground

transportation services. (Brittenum Decl. ¶¶ 18(d)-(f) & Exs. H-J.) Defendant did not enter into written agreements with any of these independent ground agents. (Brittenum Decl. ¶¶ 18(d)-(f).) In addition, Defendant has arrangements with tour operators, travel agents, and other entities that charter buses, pursuant to which Defendant's drivers transport passengers to and from the local airports to and from local hotels or other destinations. (Kelly Decl. ¶ 12 & Ex. A.) There is no evidence in the record indicating that Defendant entered into a written agreement with any of these tour operators, travel agents, or other entities.

Generally, Defendant's drivers are assigned to jobs on a rotating basis, and Defendant calls on its drivers to do all different types of work. (Brittenum Dep. 63:1-4, Jan. 14, 2008.) However, Defendant also maintains a seniority list for all its drivers, and drivers with seniority usually get first pick as to the types of jobs they will be assigned. Where a driver with seniority prefers to stay local, he can choose to work a local route. (Pls.' SMF ¶¶ 15-16; Riley Dep. 19:7-10:7.) In an October 24, 2006 memorandum to all Defendant's drivers from Bret Brittenum, Defendant's Vice President and General Manager, Defendant explained its seniority policy as follows: "Seniority will be used for granting time-off, vacations, positioning of coaches at debark, some work and vehicle assignments, route assignments on fixed routes, and for other to be determined uses. Work is

assigned on a rotation basis so that everyone has a chance to work." (Pls.' SMF, Ex. 15.)

Defendant's "Hiring Standards" form effective October 7, 2003, states that drivers must "Be Able To Work Various Jobs, Hours And Shifts (Local & Out of Town)." (Pls.' SMF, Ex. 16.) Defendant's "Hiring Standards" form effective October 7, 2003, was revised sometime in 2006 and states that drivers must "Be able to work various jobs, hours, shifts (local & out of town) and be willing and able to drive interstate routes." (Brittenum Decl. ¶ 11 & Ex. C.) Each driver must sign Defendant's Hiring Standards form before they can perform any driving jobs for Defendant. (Brittenum Decl. ¶ 11.) If a driver refuses to perform an assignment without good cause, the refusal is grounds for automatic termination. (Brittenum Decl. ¶ 20; Arditi Decl. ¶ 4; Brittenum Dep. 63:13-16, Jan. 14, 2008; Arditi Dep. 76.) The affirmations of twenty-three of the Plaintiff drivers in this action demonstrate that it was common knowledge among the drivers that they would be fired for refusing a job assignment. (Pl.'s SMF in Resp. to Def.'s Mot. for Summ. J., Ex. 12.)

Defendant has approximately thirty-five to forty drivers who currently drive routes for shuttle services Defendant provides for the University of Miami. (Brittenum Dep. 10:5-11:13, Jan. 14, 2008.) It is not unusual for drivers driving the University shuttle routes to work more than sixty hours per week. (Brittenum Dep. 57-58, Jan. 14, 2008.) According to Defendant, it does not have drivers that exclusively

drive University shuttle routes. (Brittenum Dep. 10:4-17, Jan. 14, 2008.) Rather, the bus drivers that drive shuttle routes for the University of Miami, Florida International University, and Barry University are considered a part of Defendant's "regular drivers pool." (Rivera Dep. 47:1-18.) However, according to Plaintiffs, based on the deposition testimony of Defendant's Assistant Director of Operations, Priscilla Rivera, Defendants have drivers that "mainly work" the University shuttle routes (the "University shuttle bus drivers"). (Rivera Dep. 34-35; 47-49; 54-55.) The University shuttle bus drivers may be asked to do general charter work, including trips across the State line or airport-to-seaport runs, but these drivers are not required to do such work. (Rivera Dep. 34-35; 47-49; 54-55; Harper Aff. ¶¶ 3-4.) For example, according to Dwayne Harper, the supervisor of Defendant's University of Miami shuttle bus drivers, typically towards the end of each week Harper receives a phone call "from someone from [Defendant's] main terminal, asking that [he] try to find a certain few [University of Miami] drivers who would be willing to drive on the upcoming weekend." (Harper Aff. ¶ 3.) Harper "then ask[s] around to see if anyone would like to work the weekend job(s) to earn some extra money." (Harper Aff. ¶ 3.) According to Harper, he "offer[s] these jobs to [his] drivers, [but he] do[es] not force them to work the weekend jobs and they are free to turn them down." (Harper Aff. ¶ 4.)

The majority of Plaintiffs in this action have, during the course of their employment by Defendant,

driven passengers to and from local airports to and from local seaports, and to and from the seaports to and from local hotels. (Def.'s SMF ¶ 11.) Of the sixty-three Plaintiffs in mis [sic] case, forty-eight, (76%), have driven some type of airport or airport-seaport transfer during the period from August 2004 through December 2007. (Def.'s SMF ¶¶ 11 & 16.) Those Plaintiffs have received a total of more than 1,000 such assignments, each of which represents multiple trips to and from the airports and seaports. (Def.'s SMF ¶¶ 11 & 16.) The majority of the Plaintiffs who have not actually driven passengers to and from seaports and airports were employed by Defendant for a short period of time. (Def.'s SMF ¶ 11.)

*LEGAL STANDARD*

Summary judgment is authorized only when the moving party meets its burden of demonstrating that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56. When determining whether the moving party has met this burden, the court must view the evidence and all factual inferences in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Rojas v. Florida*, 285 F.3d 1339, 1341-42 (11th Cir.2002).

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of proving that no genuine issue of material fact exists, the non-moving party must make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Poole v. Country Club of Columbus, Inc.,* 129 F.3d 551, 553 (11th Cir.1997); *Barfield v. Brierton,* 883 F.2d 923, 933 (11th Cir.1989). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. *Envntl. Def. Fund v. Marsh,* 651 F.2d 983, 991 (5th Cir.1981).[5] Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co.,* 420 F.2d 1211, 1213 (5th Cir.1969). If reasonable minds might differ on the inferences arising from undisputed facts then the court should deny summary judgment. *Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys., Inc.,* 669 F.2d 1026, 1031 (5th Cir.1982); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d

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[5] Decisions of the United States Court of Appeals for the Fifth Circuit entered before October 1, 1981, are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir.1981).

202 (1986) ("[T]he dispute about a material fact is 'genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'").

Moreover, the party opposing a motion for summary judgment need not respond to it with evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes,* 398 U.S. at 160, 90 S.Ct. 1598. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg,* 370 F.2d 605, 611-12 (5th Cir.1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *Liberty Lobby, Inc.,* 477 U.S. at 255, 106 S.Ct. 2505.

*MOTOR CARRIER EXEMPTION*

Under the FLSA, an employer must compensate employees for hours worked in excess of forty per week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Defendant argues that Plaintiffs are exempt under the motor carrier exemption, 29 U.S.C. § 213(b)(1), and therefore not entitled to overtime compensation. "The question of how [Plaintiffs spent their time working for Defendants] is a question of

fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986); *see also Morrison v. Quality Transp. Servs., Inc.*, 474 F.Supp.2d 1303, 1308 (S.D.Fla.2007) (citing *Icicle Seafoods*, 475 U.S. at 714, 106 S.Ct. 1527). The employer has the burden of proving the applicability of the FLSA exemption. *Klinedinst v. Swift Inv., Inc.*, 260 F.3d 1251, 1254 (11th Cir.2001); *see also Morrison*, 474 F.Supp.2d at 1308 (citing *Klinedinst*, 260 F.3d at 1254). Exemptions to the FLSA "are to be narrowly construed against the employer who asserts them." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir.1995); *Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1364 (11th Cir.1997) (recognizing that the FLSA's exemptions must be narrowly construed, "giving due regard to the plain meaning of statutory language and the interest of Congress," and also recognizing that "'[t]o extend an exemption to other than those plainly and unmistakably *within its terms and spirit* is to abuse the interpretive process and to frustrate the announced will of the people'" (quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 89 L.Ed. 1095 (1945))).

Under § 213(b)(1) of the FLSA, the provisions of § 207 "shall not apply with respect to [ ] any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section

31502 of Title 49." 29 U.S.C. § 213(b)(1). Section 31502(a)(1) limits the application of § 31502 to transportation "described in section[ ] 13501" of Title 49. 49 U.S.C. § 31502(a)(1). As relevant to this action, § 13501 of Title 49 gives the Secretary of Transportation jurisdiction over transportation by motor carriers to the extent that passengers, property, or both are transported by motor carrier between a place in a State and a place in another State; a State and another place in the same State through another State; or the United States and a place in a foreign country to the extent the transportation is in the United States. 49 U.S.C. § 13501.[6]

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[6] Section 13501 provides, in full, as follows:

The Secretary and the Board have jurisdiction, [as specified in Part B of Subtitle IV of Title 49], over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier –

(1) between a place in –

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

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The applicable regulations explain that the "exemption of an employee from the hours provisions of the Fair Labor Standards Act . . . depends both on the class to which his employer belongs and on the class of work involved in the employee's job." 29 C.F.R. § 782.2. More specifically, the Secretary of Transportation has the authority to establish maximum hours and qualifications of service for employees, and thereby trigger application of the motor carrier exemption, if two requirements are met: (1) an employee plaintiff must "be employed by carriers whose transportation of passengers is subject to the Secretary's jurisdiction" under the Motor Carrier Act; and (2) an employee plaintiff must "engage in activities of a character directly affecting the safety of operation of motor vehicles in interstate or foreign commerce within the meaning of the Motor Carrier Act." 29 C.F.R. § 782.2.

As the court in *Morrison* observed, "[t]he Department of Labor's jurisdiction under the FLSA and the Department of Transportation's jurisdiction under the Motor Carrier Act are mutually exclusive and there is no overlapping jurisdiction." *Morrison,* 474 F.Supp.2d at 1309 n. 2 (citing *Morris v. McComb,* 332 U.S. 422, 437-38, 68 S.Ct. 131, 92 L.Ed. 44 (1947)). "In order to avoid any conflicts between these Acts, Congress decided that the Secretary of Transportation need not

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(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

49 U.S.C. § 13501.

actually exercise his or her power to regulate under the Motor Carrier Act and that the FLSA's § 213(b)(1) exemption applies so long as the Secretary has the authority to regulate over a particular category of employees." *Id.* (citing *Spires v. Ben Hill County,* 980 F.2d 683, 686 (11th Cir.1993)).

A. *Whether Defendant Is A Carrier Whose Transportation of Passengers is Subject to the Secretary's Jurisdiction Under the Motor Carrier Act*

First, the Court must determine whether, as a matter of law, Defendant is a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act, or whether there are genuine issues of material fact that preclude such a determination by the Court at this stage in the litigation.

In *Baez v. Wells Fargo Armored Service Corp.*, the Eleventh Circuit found that the defendant, which held a permit from the Interstate Commerce Commission (ICC), was a "contract carrier," and as such, subject to the Secretary's jurisdiction under the Motor Carrier Act. 938 F.2d 180, 182 (11th Cir.1991) (citations omitted), *cert. denied,* 502 U.S. 1060, 112 S.Ct. 941, 117 L.Ed.2d 111 (1992). In making this finding, the *Baez* court stated: "In fact, the permit issued by the ICC indicates that jurisdiction has

already been exercised."[7] *Id.* (citing *Brennan v. Schwerman Trucking Co. of Virginia, Inc.*, 540 F.2d 1200 (4th Cir.1976)). Therefore, the *Baez* court concluded, "it [was] clear that [the defendant] [was] a motor carrier subject to the Secretary's jurisdiction." *Id.; see also Morrison v. Quality Transports Services, Inc.*, 474 F.Supp.2d 1303, 1309 (S.D.Fla.2007) (finding that the defendant demonstrated that it was a motor carrier whose transportation of property or passengers was subject to the Secretary's jurisdiction under the Motor Carrier Act based on evidence that (1) the defendant held a USDOT license; (2) the defendant operated vehicles whose weight or passenger capacity fell within the authority of the FMSCA; and (3) the defendant was subject to regulation by the FMSCA including regular inspections by the USDOT).

Relying on *Baez* and *Morrison*, Defendant argues that, based on the following undisputed evidence in the record, it has met its burden of establishing that it is a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act: (1) Defendant is licensed by the USDOT, and holds all of the authorizations required of interstate motor carriers of passengers issued by the FMCSA; (2) Defendant has been issued a USDOT

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[7] In 1995, Congress passed the ICC Termination Act, which transferred motor carrier operating authority responsibilities to the Department of Transportation (DOT). Pub.L. No. 104-88, §§ 103-104, 109 Stat. 803 (1995) (codified as amended at 49 U.S.C. § 13501 (2000)).

number by the FMSCA evidencing its right to engage in interstate commerce subject to the FMSCA's safety regulations; (3) Defendant makes extensive efforts to comply with federal requirements for interstate drivers; (4) Defendant's drivers are required to become qualified to drive all types of vehicles used by Defendant for passenger transportation and Defendant maintains a "driver qualification file" for each driver as required by 49 C.F.R. § 391.51(a); (5) Defendant is required to comply with the FMCSR, including hours of service regulations governing drivers of vehicles used in interstate commerce at 49 C.F.R. Part 395 and to maintain required USDOT records evidencing such compliance; (6) Defendant's drivers are subject to random drug alcohol testing required by the FMSCR; and (7) Defendant has been audited by the USDOT. Applying *Baez* and *Morrison,* the Court finds that the undisputed evidence in the record is sufficient to establish that Defendant is a motor carrier whose transportation of property or passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act.[8]

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[8] Plaintiffs admit that "all of the indicia of an 'interstate carrier' are present." However, Plaintiffs cite *Cartun v. Carey International, Inc.,* No. 0421074-CIV-UNGARO-BENAGES, 2004 U.S. Dist. LEXIS 30346, at *26 (S.D.Fla. Dec. 9, 2004), in which this Court rejected the plaintiffs argument that the defendants could not rely on the motor carrier exemption as a result of the defendants' failure to adhere to the requirements imposed on motor carriers under the Motor Carrier Act. In *Cartun,* this Court observed that the motor carrier exemption

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The Court also notes that Defendant undisputably holds itself out as an interstate motor carrier and advertises interstate services. *See Chao v. First Class Coach Co.*, 214 F.Supp.2d 1263, 1271 (M.D.Fla.2001) ("Merely holding itself out as an interstate commerce carrier, which [the defendant] unquestionably did, may have been enough to determine its status as an interstate motor carrier.") (citing *Brennan*, 540 F.2d at 1204); *see also Rossi v. Associated Limousine Servs., Inc.*, 438 F.Supp.2d 1354, 1361 (S.D.Fla.2006) ("[D]ecisions under the FLSA hold that the Secretary of Transportation has the power to set maximum hours for drivers if the company engages in more than *de minimi* interstate commerce which includes a company that holds itself out as a interstate company and solicits that business even though its prospect of obtaining such business is poor and some of its drivers never drive in interstate commerce." (citing

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turns "only on the jurisdiction conferred on the Secretary of Transportation under the Motor Carrier Act; application of the exemption does not . . . depend also on the employer's conformance with the requirements of the Motor Carrier Act." *Id.* (citing *Bilyou v. Dutchess Beer Distributors, Inc.*, 300 F.3d 217, 229 (2d Cir.2002)). *Cartun* is not inconsistent with this Court's finding that Defendant has met its burden of establishing that it is a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act based on the undisputed evidence in the record. *See also Packard v. Pittsburgh Transp. Co.*, 418 F.3d 246 (3d Cir.2005), *cert. denied*, 547 U.S. 1093, 126 S.Ct. 1786, 164 L.Ed.2d 557 (2006) ("[T]he MCA exemption depends only on the existence of secretarial authority, not on its exercise."); *Morrison*, 474 F.Supp.2d at 1309 n. 2 (same) (citing *Spires*, 980 F.2d 683, 686 (11th Cir.1993)).

*Reich v. Am. Driver Serv., Inc.*, 33 F.3d 1153 (9th Cir.1994); *Morris v. McComb*, 332 U.S. 422, 68 S.Ct. 131, 92 L.Ed. 44 (1947))).

In reaching its determination that Defendant has met its burden of establishing that it is a motor carrier whose transportation of property or passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act, the Court has considered Plaintiffs' arguments that despite the foregoing evidence in the record, Defendant has not met – or cannot meet – its burden because, according to Plaintiffs, the "true test" to determine whether Defendant is within the Secretary's jurisdiction for purposes of the motor carrier exemption is whether Defendant engages in more than *de minimus* interstate operations, and, based on the percentage of trips Defendant made across the State line out of the total number of trips it made during the period from August 2004 through December 2007, Plaintiffs argue that Defendant cannot show that it engages in more than *de minimus* interstate operations. However, for the following reasons, the Court finds Plaintiffs' arguments unavailing.

Plaintiffs rely on *Mason v. Quality Transport Services, Inc.*, No. 04-61009-CIV-ALTONAGA/Turnoff, 2005 WL 5395338, at *1 (S.D.Fla. Aug.29, 2005). However *Mason* actually supports a finding that Defendant is a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act. In *Mason*, (1) the defendant was a corporation that provided bus service locally

and nationwide, including long and short distance charter service, shuttle service, and transfer service; (2) interstate service was a significant component of the defendant's gross sales; and (3) the defendant had a certificate from the ICC authorizing it to operate in interstate and foreign commerce as a motor vehicle common motor carrier. *Id.* at *1. The *Mason* court observed that the "Secretary's power to set maximum hours for drivers is contingent upon the company engaging in more than *de minimus* interstate commerce," but that "[e]ven then, the Secretary does not have automatic jurisdiction over all drivers of an interstate carrier," and that jurisdiction "extends only to drivers who reasonably could be expected to make one of the carrier's interstate runs, and that means more than a remote possibility." *Id.* at *2. The *Mason* court denied summary judgment, finding that the evidence in the record "plainly introduced genuine issues of material fact concerning [the second prong of the test for determining the applicability of the motor carrier exemption,] whether [the plaintiff] could reasonably be expected to drive one of [the defendant's] interstate routes."[9] *Id.* at *3.

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[9] Apparently the first prong of the test for determining the applicability of the motor carrier exemption – *i.e.* that the defendant must be a motor carrier whose transportation of property or passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act – was satisfied by evidence that (1) the defendant was a corporation that provided bus service locally and nationwide, including long and short distance charter service, shuttle service, and transfer service; (2) interstate service

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Applying *Mason*, the Court can easily conclude that Defendant has met its burden of establishing that it is a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act based on the following undisputed evidence in the record: (1) Defendant is a corporation that provides bus service locally and nationwide, including long and short distance charter service, shuttle service, and transfer service; (2) Defendant is licensed by the USDOT, and holds all of the authorizations required of interstate motor carriers of passengers issued by the FMCSA; and (3) Defendant's trips across the State line during the period from August 2004 through December 2007 were a significant component of Defendant's business in that they produced over $1.7 million, or 4% of Defendant's total revenues for that time period.[10]

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was a significant component of the defendant's gross sales; and (3) the defendant had a certificate for the ICC authorizing it to operate in interstate and foreign commerce as a motor vehicle common motor carrier.

[10] As the Court has already addressed, *supra* note 3, Plaintiffs wish to subtract from the total revenues derived from trips across the State line during the period from August 2004 through December 2007 the revenue derived from trips to Louisiana made in September and October 2005, and August and November 2006 for purposes of providing hurricane relief in Louisiana. Plaintiffs argue that these trips should not be included in calculating the total revenues derived from trips across the State line during the period from August 2004 through December 2007 because the trips were "anomalous," and because at least some of these trips involved driving across the

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Plaintiffs also rely on *Morris v. McComb,* 332 U.S. 422, 68 S.Ct. 131, 92 L.Ed. 44 (1947), in which the Court considered the percentage of "total trips" in determining that the defendant was a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act, and on *Garcia v. Fleetwood Limousine,* 511 F.Supp.2d 1233 (M.D.Fla.2007), in which the court considered "the employer's overall business, including the number of interstate trips made and the percentage of revenue from interstate trips," and "whether the carrier holds itself out to the public as providing

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State line with an empty bus, and then driving passengers within the State of Louisiana.

As the Court found in note 3, *supra,* Plaintiffs have not provided a legal basis for subtracting such revenues. However, even assuming that the revenue derived from these hurricane-related Louisiana trips should be subtracted from the revenues derived from Defendant's trips across the State line during the period from August 2004 through December 2007, the Court still finds – based on the undisputed evidence that Defendant holds itself out as an interstate carrier, is licensed by the USDOT and has the right to engage in interstate commerce subject to the FMSCA's safety regulations – that Defendant has met its burden of establishing that it is a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act.

In other words, assuming that Plaintiffs have created an issue of fact as to the revenues produced by Defendant's trips across the State line during the period from August 2004 through December 2007, it is not material to the issue of whether Defendant is a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act.

interstate transportation through advertising, marketing, or otherwise" as "relevant factors" in the determination of whether the defendant is a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act. *See also Lieberman v. Corporate Connection Lines, Inc.*, No. 03-CIV-22814, 2005 WL 5501491, at *1-2 (S.D.Fla. Apr.21, 2005) ("A carrier's involvement in interstate commerce must be established by some concrete evidence such as an actual trip in interstate commerce or proof that interstate business was solicited. . . . Furthermore, the [d]efendant's involvement in interstate commerce must be real and actual, not merely hypothetical or conjectural. If the employer or employee's involvement In [sic] interstate commerce could be characterized as de minimus, they may not be subject to the Secretary of Transportation's jurisdiction at all, and thus are not covered by the Motor Carrier Act."); *Rossi*, 438 F.Supp.2d at 1361-62 (finding that the defendant failed to meet its burden of establishing that it was engaged in interstate commerce for purposes of the motor carrier exemption where the defendant did not present any evidence showing an actual trip in interstate commerce or proof that interstate business was solicited). None of the decisions upon which Plaintiffs rely militate against a finding by the Court that Defendant has met its burden of establishing that it is a carrier whose transportation of passengers is subject to the

Secretary's jurisdiction under the Motor Carrier Act based on the undisputed evidence in the record.[11]

B. *Whether Plaintiffs Engaged in Activities of a Character Directly Affecting the Safety of Operation of Motor Vehicles in Interstate or Foreign Commerce Within the Meaning of the Motor Carrier Act*

Having determined that Defendant is a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act, the Court must next determine whether as a matter of law Plaintiffs engage in or have engaged in activities of a character directly affecting the safety of operation of motor vehicles in interstate or foreign

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[11] The Court also notes that the FLDOT's determinations during the May 2007 audit – in particular its determinations, based on information provided by Defendant including thousands of randomly sampled driver logbooks, that the majority of Defendant's trips were within the State; that Defendant conducted a limited number of trips across the State line; that sixty-seven of Defendant's then-employed drivers did not make any trips across the State line while employed by Defendant; and that out of thousands of logbook entries, there was a total of nine trips across the State line – do not create a genuine issue of material fact as to whether Defendant is a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act, because the Court's determination is based on its finding that Defendant has met its burden by establishing that it holds itself out as a interstate company and solicits that business, and that it is licensed by the USDOT and has the right to engage in interstate commerce subject to the FMSCA's safety regulations.

commerce within the meaning of the Motor Carrier Act, or whether there are genuine issues of material fact that preclude such a determination by the Court at this stage in the litigation. It is not disputed that Plaintiffs engaged in activities of a character directly affecting the safety of operation of motor vehicles; thus, the issue before the Court is whether Plaintiffs were engaged in interstate or foreign commerce within the meaning of the Motor Carrier Act.[12]

Defendant argues that it has met its burden of establishing that Plaintiffs engaged in interstate or foreign commerce within the meaning of the Motor Carrier Act in two ways: (1) by presenting evidence that all of its drivers could reasonably be expected to drive routes within the State that may be considered movement in interstate commerce within the meaning of the Motor Carrier Act because they are part of a "practical continuity of movement" across State lines from the point of origin to the point of destination; and (2) by presenting evidence that it regularly makes trips across the State line and that each of its drivers could reasonably be expected to make such trips.

For the reasons that follow, the Court finds that – with the exception of its University shuttle bus

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[12] The applicable regulations explain that "[t]he work of an employee who is a full-duty or partial duty 'driver,' . . . directly affects 'safety and operation' . . . whenever he drives a motor vehicle in interstate or foreign commerce within the meaning of [the Motor Carrier Act]." 29 C.F.R. § 782.3(b).

drivers – Defendant has met its burden of establishing that all of its drivers could reasonably be expected to drive routes within the State that are movement in interstate commerce within the meaning of the Motor Carrier Act. It is therefore unnecessary for the Court to make a determination as to whether all of Defendant's drivers could reasonably be expected to make trips across the State line. As to Defendant's University shuttle bus drivers, there are genuine issues of material fact concerning whether these drivers could reasonably be expected to make trips out of State or to drive routes within the State that are movement in interstate commerce within the meaning of the Motor Carrier Act.

Defendant argues that Plaintiffs are exempt under the motor carrier exemption because (1) Defendant's transportation of passengers to and from the local airports to and from the local seaports pursuant to contractual arrangements with one or more cruise lines and independent ground agents is movement in interstate commerce within the meaning of the Motor Carrier Act because it is part of a "practical continuity of movement" across State lines from the point of origin to the point of destination; and (2) all of Defendant's drivers could reasonably be expected to drive passengers on airport-to-seaport and seaport-to-airport runs pursuant to these arrangements during the relevant time period.

1. *Defendant's Seaport-to-Airport and Airport-to-Seaport Routes Are Movement in Interstate Commerce Within the Meaning of the Motor Carrier Act*

Plaintiffs argue that Defendant's transportation of passengers to and from the local airports to and from the local seaports pursuant to contractual arrangements with one or more cruise lines and independent ground agents is not movement in interstate commerce within the meaning of the Motor Carrier Act. The applicable regulations explain that "[w]hat constitutes . . . transportation in interstate or foreign commerce, sufficient to bring . . . an employee within the regulatory power of the Secretary of Transportation . . . , is determined by definitions contained in the Motor Carrier Act itself," but that "[t]hese definitions are . . . not identical with the definitions in the Fair Labor Standards Act which determine whether an employee is within the general coverage of the wage and hours provisions as an employee 'engaged in (interstate or foreign) commerce'" 29 C.F.R. § 782.7(a). Thus, while "transportation within a single State is in interstate commerce within the meaning of the Fair Labor Standards Act where it forms a part of a 'practical continuity of movement' across State lines from the point of origin to the point of destination. . . . such transportation may or may not be considered also a movement in interstate commerce within the meaning of the Motor Carrier Act." 29 C.F.R. § 782.7(b)(1) (citing *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460 (1943)). The regulations explain that although

"[d]ecisions of the Interstate Commerce Commission prior to 1966 seemingly have limited the scope of the Motor Carrier Act more narrowly than the courts have construed the Fair Labor Standards Act It is deemed necessary, [ ]as an enforcement policy only . . . to assume that such a movement in interstate commerce under the Fair Labor Standards Act is also a movement in interstate commerce under the Motor Carrier Act, except in those situations where the Commission has held or the Secretary of Transportation or the courts hold otherwise." 29 C.F.R. § 782.7(b)(1). "[W]here . . . it has been authoritatively held that transportation of a particular character within a single State is not in interstate commerce as defined in the Motor Carrier Act . . . , there is no basis for an exemption under section 13(b)(1), even though the facts may establish a 'practical continuity of movement' from out-of-State sources."[13] 29 C.F.R. § 782.7(b)(1).

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[13] Plaintiffs urge the Court to follow the concurring opinion in *Packard v. Pittsburgh Transportation Co.*, 418 F.3d 246, 259 (3d Cir.2005), which would not look for guidance to applicable regulations and case law to determine whether a motor carrier providing wholly intrastate passenger transportation service may be engaged in "interstate commerce" within the meaning of the Motor Carrier Act where the intrastate passenger transportation service is within the "practical continuity of movement" in interstate travel. Rather, the concurring opinion in *Packard* would "hold the plain language of the Act's jurisdictional statute to be dispositive," insofar as the motor carrier exemption applies only where a motor carrier provides transportation across State lines. *Id.* The Court declines to follow the concurring opinion in

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Based on a prior decision of this Court, *Cartun v. Carey International, Inc.*, No. 0421074-CIV-UNGARO-BENAGES, 2004 U.S. Dist. LEXIS 30346 (S.D.Fla. Dec. 9, 2004), Plaintiff argues that Defendant cannot bring its drivers under the motor carrier exemption because it cannot demonstrate that it has a valid through ticketing or common arrangement with an air carrier. However, in *Cartun*, this Court found that the defendant, an intrastate limousine service providing transportation between the local airport and seaport had failed to establish that it was within the Secretary's jurisdiction (and outside the jurisdiction of the Department of Labor) where it had failed to produce evidence of a through ticketing or common arrangement with an air carrier. Likewise, in *In re Kimball*, 131 M.C.C. 908 (1980), on which Plaintiff also relies, the issue was the Secretary's jurisdiction over the petitioner's entirely local bus service. In contrast, in this case Defendant has clearly demonstrated that it is engaged in interstate commerce and therefore subject to the jurisdiction of the Secretary of the USDOT. Thus, in this case the relevant question is different from that presented in

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*Packard* and depart from the majority view among Courts of Appeal that have "explored the scope of the Motor Carrier Act exemption via inquiry into the presence or absence of interstate commerce." *Id.* at 260 n. 11 (citing *Bilyou v. Dutchess Beer Distrib., Inc.*, 300 F.3d 217, 223 (2d Cir.2002); *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1470 (9th Cir.1997); *Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670, 672 (10th Cir.1993); *Beggs v. Kroger Co.*, 167 F.2d 700, 702-03 (8th Cir.1948)).

*Cartun* and *Kimball;* it is not whether Defendant is subject to the USDOT's jurisdiction, but whether Plaintiffs are engaged in interstate commerce and, as a result, within the motor carrier exemption.[14]

In contrast to the scenario before the Court in *Cartun,* there does not appear to be an ICC or STB decision in which it has been authoritatively held that where a carrier subject to the jurisdiction of the Secretary of the USDOT provides ground transportation between local airports and seaports for passengers, immediately prior to and subsequent to the passengers' interstate flights and international cruise voyages, such movement is not within interstate commerce as defined in the Motor Carrier Act. Therefore, if such movement is in interstate commerce under the FLSA, the Court must assume that such movement is also in interstate commerce under the Motor Carrier Act. 29 C.F.R. § 782.7(b)(1) ("Under this enforcement policy it will ordinarily be assumed by the Administrator that the interstate commerce requirements of the section 13(b)(1) exemption are satisfied where it appears that a motor carrier employee is engaged as a driver . . . in transportation by

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[14] This Court found in *Cartun* that two decisions of the ICC or STB – *Kimball* and *Motor Transportation of Passengers Incidental to Air,* 95 M.C.C. 526 (1964) – were "decisive" as to the issue before it, *i.e.* whether the defendant, an entirely local intrastate limousine service providing transportation between the local airport and seaport, was within the Secretary's jurisdiction (and outside the jurisdiction of the Department of Labor). *Cartun,* 2004 U.S. Dist. LEXIS 30346, at *18.

motor vehicle which, although confined to a single State, is a part of an interstate movement of the goods or persons being thus transported so as to constitute interstate commerce within the meaning of the Fair Labor Standards Act. This policy does not extend to drivers . . . whose transportation activities are 'in commerce' . . . within the meaning of the act but are not a part of an interstate movement of the goods or persons carried") (citing *Wirtz v. Crystal Lake Crushed Stone Co.*, 327 F.2d 455 (7th Cir.1964)).[15] 29 C.F.R. § 782.7(b)(1).

In determining whether an employee is engaged in interstate commerce within the meaning of the FLSA, the courts have been "guided by practical

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[15] To illustrate, *Wirtz v. Crystal Lake Crushed Stone Co.*, 327 F.2d 455, 456 (7th Cir.1964) involved a suit for violation of the FLSA's overtime provisions brought against a trucking service by its employee drivers engaged in the handling and transportation of sand and gravel. The transportation services at issue involved the transportation of sand, gravel and chips from the manufacturing plant to a concrete mixing plant. *Id.* at 457. Additionally, the employee drivers transported materials in connection with construction and reconstruction of streets, roads and highways to job sites and also spread gravel on road surfaces and performed other types of general hauling and excavating work. *Id.* at 458-59. The *Wirtz* court found that the employee drivers' transportation services were in commerce within the meaning of the FLSA because they involved construction and maintenance of instrumentalities of interstate commerce, *i.e.*, public streets, roads, and highways. *Id.* at 457 & 458-59. Although these transportation activities were "in commerce" within the meaning of the FLSA, they were not a part of an interstate movement of the goods carried. *See* 29 C.F.R. § 782.7(b)(1).

considerations." *Marshall v. Victoria Transp. Co.*, 603 F.2d 1122, 1123 (5th Cir.1979) (quoting *Overstreet v. North Shore Corp.*, 318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656, (1943) (quoting *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460 (1943))).[16] In making this determination, the courts looks to see if an employee's work "is actually in commerce or is so closely related to the movement of commerce that it is for practical purposes a part of it rather than an isolated local activity." *Id.* (citing *Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427, 75 S.Ct. 860, 99 L.Ed. 1196 (1955)).

In *Marshall*, the Fifth Circuit considered the issue of whether two city bus operators' employee drivers were transporting passengers "in commerce" within the meaning of the FLSA where the drivers were engaged in the transportation of persons traveling between Texas and Mexico. *Id.* The *Marshall* court observed that reliance on *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947) was problematic because *Yellow Cab* "is an anti-trust suit in which the broader [FLSA] coverage precedents are not applicable," and because the taxi service at issue in *Yellow Cab* was found to be "only casual and incidental" to its passengers' travel to and from a railroad terminal, whereas in *Marshall*,

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[16] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

"every bus route ... carrie[d] a substantial percentage of international travelers every day."[17] *Id.* at 1124. Instead, the Fifth Circuit found that the "correct rule" in the situation presented in *Marshall*

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[17] In *Yellow Cab*, the Supreme Court, in the context of interpreting the applicability of the Sherman Act, considered whether a local taxicab company's transportation of persons embarking on or arriving from interstate rail journeys was transportation in interstate commerce. *Yellow Cab*, 332 U.S. at 230, 67 S.Ct. 1560. The Court observed that "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business," and that "interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.'" *Id.* at 231, 67 S.Ct. 1560. (citations omitted). The Court also noted that "what may fairly said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey," and that "the beginning and end of a particular kind of interstate commerce [must accordingly be marked] by its own practical considerations." *Id.*

The *Yellow Cab* Court went on to find that "the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination." *Id.* "What happens prior to or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement," because the "traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance." *Id.* at 232. The Court observed that the taxicab service is "contracted for independently of the railroad journey and may be utilized whenever the traveler so desires." *Id.* "From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey," and "[t]o the taxicab driver, it is just another local fair." *Id.*

derived from *United States v. Capital Transit Co.*, 338 U.S. 286, 70 S.Ct. 115, 94 L.Ed. 93 (1949), in which the Court held that a transit company's provision of transportation wholly within the District of Columbia for passengers bound to and from nearby Virginia establishments was part of a continuous stream of interstate transportation. *Marshall*, 603 F.2d at 1125 (quoting *Capital Transit Co.*, 338 U.S. at 290, 70 S.Ct. 115 (explaining that *Yellow Cab* did not conflict with its holding)).

In *Marshall*, the defendant bus operators "maintained downtown terminals a short distance from the International Bridge that crosses the Rio Grande," and operated regular fare paying routes within the city of Brownsville, Texas. *Id.* at 1124. In addition, "[u]nder contractual arrangements with merchants and shopping center operators, each defendant also operate[d] a route providing free bus service to the vicinity of [a nearby] shopping center." *Id.* All the intrastate routes were within walking distance of the bridge connecting Texas to Mexico, and between fourteen and eighteen "percent of all fare paying passengers on [the defendants'] buses either originate[d] or terminate[d] their journeys in Mexico." Based on this evidence, the *Marshall* court found that "although [the] defendants' employees [did] not cross into Mexico, a substantial, regular and recurring part of their work consist[ed] of transporting persons that [were] making international journeys." *Id.* "Because their work was entwined with a continuous stream of

international travel, they were engaged in commerce within the meaning of the [FLSA]." *Id.* at 1125.

Applying the *Capital Transit* rule followed by the Fifth Circuit in *Marshall,* the evidence in the record clearly demonstrates that the transportation of passengers on the airport-to-seaport and seaport-to-airport routes by Defendant's employee drivers is in interstate commerce within the meaning of the FLSA. As to Defendant's agreement with RCCL, Defendant has provided the Court with a copy of the Transportation Services Agreement entered into by Defendant and RCCL, pursuant to which Defendant provides ground transportation services between the South Florida seaports and airports to RCCL's cruise passengers who purchase such services through travel agents or directly through RCCL. Under the Transportation Services Agreement between Defendant and RCCL, Defendant provides motor transportation of passengers between seaports and airports either immediately prior or immediately subsequent to the passengers' international cruise voyages from or to the seaport, and immediately prior or immediately subsequent to the passengers' air travel.

As to Defendant's arrangements with Costa Cruises and Princess Cruises, and with independent ground agents, tour operators, travel agents, and other entities that charter buses, no written agreements have been supplied as evidence. However, Defendant has provided the undisputed testimony of Vice President and General Manager Brett Brittenum that Defendant's drivers regularly have transported

and continue to transport passengers between South Florida airports and seaports under various oral "contracts or other arrangements that [Defendant] has with numerous cruise lines or their ground agents," and that pursuant to these agreements: (1) the cruise lines' passengers "purchased a pre-arranged single ticket or package of tickets from a cruise line or ground agent that includes airfare, ground transportation, in some cases a hotel, and an international cruise"; (2) Defendant's drivers "transport these passengers, the vast majority of whom have traveled from out of state, in buses, from local airports . . . to local hotels, and then to local seaports . . . or directly from the airports to the seaports"; (3) "[w]hen the passengers return from their cruises, [Defendant's] drivers transport them back to a hotel, and then to the airport, or directly to the airport"; the "charges for this transportation are pre-fixed, *i.e.*, they are set by the . . . arrangement between [Defendant] and the cruise lines or their agents"; and (4) "the vehicle is exclusively dedicated to use by cruise passengers on these trips and the itinerary is specified in advance." (Brittenum Decl. ¶ 18.) Defendant has presented no specific evidence regarding the terms of its arrangements with Princess Cruises and Costa Cruises, or with independent ground agents, tour operators, travel agents, and other entities that charter buses, but Defendant has provided evidence of its cash receipts and revenues derived from its transportation of Princess Cruises and Costa Cruises passengers, as well as Prince Cruise VIP passengers, Cunard

Cruise passengers, and Crystal Cruise passengers. (Brittenum Decl. ¶ 18 & Exs. H-J.)

Thus, as in *Marshall,* the Court finds that although Defendant's drivers do not cross the State line while driving the airport-to-seaport and seaport-to-airport routes, a substantial, regular and recurring part of their work in driving such routes consists of transporting persons that are making interstate and international trips. Likewise, as in *Marshall,* because their work is entwined with a continuous stream of interstate and international travel, the Court finds that Defendant's drivers transporting passengers on the airport-to-seaport and seaport-to-airport routes are engaged in commerce within the meaning of the FLSA. *See Marshall,* 603 F.2d at 1125. Therefore, the Court must assume that such movement is also in interstate commerce under the Motor Carrier Act. 29 C.F.R. § 782.7(b)(1).

2. *With the Exception of Defendant's University Shuttle Bust* [sic] *Drivers, There Are No Genuine Issues of Material Fact Concerning Whether All of Defendant's Drivers Could Reasonably Be Expected to Drive Passengers on Airport-to-Seaport and Seaport-to-Airport Runs Purine* [sic] *the Relevant Time Period*

Having determined that Defendant's transportation of passengers to and from the local airports to and from the local seaports pursuant to contractual arrangements with one or more cruise lines and independent ground agents is movement in interstate

commerce within the meaning of the Motor Carrier Act, the Court next addresses Defendant's argument that all Plaintiffs are exempt from the FLSA's overtime wage requirements because all of Defendant's drivers could reasonably be expected to drive passengers on airport-to-seaport and seaport-to-airport runs pursuant these arrangements during the relevant time period.

"[E]ven a minor involvement in interstate commerce as a regular part of an employee's duties can subject that employee to the Secretary of Transportation's jurisdiction." *Reich*, 33 F.3d at 1155 (citations omitted). However, "an employee's minor involvement in interstate commerce does not necessarily subject that employee to the Secretary of Transportation's jurisdiction for an unlimited period of time." *Id.* (citations omitted). Moreover, "if the employee's minor involvement can be characterized as de minimus, that employee may not be subject to the Secretary of Transportation's jurisdiction at all." *Id.* at 1156 (citations omitted).

On the other hand, Plaintiffs may be subject to the motor carrier's exemption, and therefore exempt from the FLSA's maximum hours and overtime requirements if the carrier has engaged in interstate commerce and Plaintiffs could reasonably be expected as a regular part of their duties to drive one of Defendant's interstate routes. A reasonable expectation means that there is more than a remote possibility. *See Garcia v. Pace Suburban Bus Serv.*, 955 F.Supp. 75, 77 (N.D.Ill.1996) ("Pursuant to a

notice of interpretation, 46 Fed.Reg. 37,902, 37,903 (1981) . . . jurisdiction extends only to drivers who reasonably could be expected to make one of the carrier's interstate runs, and that means more than a remote possibility.") (citing *Reich,* 33 F.3d at 1156 & n. 4); *see also Chao,* 214 F.Supp.2d at 1274-75 (quoting *Garcia,* 955 F.Supp. at 77); *Reich,* 33 F.3d at 1156 ("If jurisdiction is claimed over a driver who has not driven in interstate commerce, evidence must be presented that the carrier has engaged in interstate commerce and that the driver could reasonably have been expected to make one of the carrier's interstate runs.") (quoting 46 Fed.Reg. 37,902, 37,903 (1981)); *see also Fleetwood Limousine,* 511 F.Supp.2d at 1240; *Morrison,* 474 F.Supp.2d at 1309-10; *Lieberman,* 2005 WL 5501491, at *2; *Mason,* 2005 WL 5395338, at *2.

In determining the applicability of the motor carrier exemption where the defendant was a carrier whose transportation of passengers was subject to the Secretary's jurisdiction under the Motor Carrier Act, but the plaintiff had "not been called upon to drive interstate routes in the past," the court in *Garcia v. Pace* considered that factor alone to "weigh[ ] against the enforcement of the exemption," but also considered the following additional factors, which, altogether weighed in favor of a determination that the exemption applied: (1) the employer was engaged in interstate commerce; (2) upon hiring, the employer required the employee to sign a form acknowledging that he or she may be called upon to drive for the company's interstate charter service; (3) the employer

required its drivers to comply with the FMSCR and maintain USDOT forms; (4) the employer maintained vehicles in accordance with ICC regulations; and (5) the FHA regularly conducted audits in which it determined that all of the employer's drivers are subject to federal safety requirements. *Garcia*, 955 F.Supp. at 77-78 (noting that all of the defendant's drivers conformed to the FMCSR and maintained all required USDOT forms, and that all of the defendant's vehicles were maintained in accordance with ICC regulations, and that, "[m]ore importantly, the Federal Highway Administration regularly performed audits in which it had determined that all the drivers were subject to federal safety requirements," and explaining: "By that we take it to mean that the Secretary of Transportation has determined that all drivers are within the Secretary's jurisdiction") (citing *Dole v. Circle "A" Construction, Inc.*, 738 F.Supp. 1313, 1322-23 (D.Idaho 1990)); *see also Chao*, 214 F.Supp.2d at 1275 (discussing and applying the *Garcia* factors).

In *Chao v. First Class Coach*, the court found that all of the defendant's drivers were exempt from the FLSA's maximum hours and overtime requirements based on the following evidence: (1) an oral agreement between the defendant and its drivers at the time they were hired that they were expected to be able and available to drive all routes offered by the company; (2) drivers were "sometimes first assigned smaller vehicles driving local routes," but they "routinely move[d] into larger vehicles driving longer

routes as part of a typical progression within the company," and "most drivers rotate[d] the types of routes they [drove]"; and (3) the defendant made efforts to comply with federal requirements for interstate drivers, including requiring its drivers to become qualified to drive all types of vehicles used by the company for passenger transportation, maintaining a "driver qualification file" for each driver as required by 49 C.F.R. § 391.51(a), subjecting all drivers to random drug alcohol testing required by the FMCSR, and, to the extent required by the FMCSR, maintaining driver's logs indicating the number of hours each driver works. *Chao,* 214 F.Supp.2d at 1275.

In reaching its conclusion that all the drivers were exempt under the motor carrier exemption, the *Chao* court also noted that the defendant "did not assign its drivers [to interstate routes] indiscriminately," as in *Morris* and *Reich*. *Id.* at 1275-76. Rather, in *Chao,* the defendant "did try to honor the requests of a few employees that they be assigned only to local routes." *Id.* at 1276. Nevertheless, the *Chao* court concluded, there was "nothing to rebut the assertion that these drivers might at any time be assigned to [an interstate route]." *Id.* The *Chao* court also considered the "percentage of drivers . . . concerned compared to [the defendant's] overall operation," noting that the "undisputed evidence reflect[ed] that at most only a handful of [those] drivers ha[d] not driven [interstate routes] during the time period at issue." *Id.* The *Chao* court concluded that it

was "obvious that [the defendant] [was] substantially involved in interstate commerce," and that all the defendant's drivers were subject to being called by the defendant to drive an interstate route, even if they had not already been called to do so. *Id.*

In this case, the undisputed evidence is that of the sixty-three Plaintiffs in this case, forty-eight (76%), have driven some type of airport or airport-seaport transfer during the period from August 2004 through December 2007. (Def.'s SMF ¶¶ 11 & 16.) Those Plaintiffs have received a total of more than 1,000 such assignments, each of which represents multiple trips to and from the airports and seaports. (Def.'s SMF ¶¶ 11 & 16.) The majority of the Plaintiffs who have not actually driven passengers to and from seaports and airports were employed by Defendant for a short period of time. (Def.'s SMF ¶ 11.) As in *Garcia* – where the employer clearly was engaged in interstate commerce, required its drivers to comply with the FMCSR, and required all its drivers upon hiring to sign a form acknowledging that they may be called upon to drive for the company's interstate charter service – and *Chao* – where the employer clearly was engaged in interstate commerce, required its drivers to comply with federal requirements, and entered into an oral agreement with its drivers at the time they were hired that they were expected to be able and available to drive all routes offered by the company – here, Defendant clearly is engaged in interstate commerce, and makes extensive efforts to comply with the federal requirements,

including requiring its drivers to become qualified to drive all types of vehicles used by Defendant for passenger transportation, maintaining a "driver qualification file" for each driver as required by the federal regulations, subjecting its drivers to random drug alcohol testing as required by the FMCSR, and maintaining logs and other records in accordance with the requirements of the hours of service and regulations governing drivers of vehicles used in interstate commerce.

Moreover, with the exception of Defendant's University shuttle bus drivers, the evidence in the record is that Defendant's drivers are assigned to jobs on a rotating basis. Defendant calls on its drivers to do all different types of work, and upon hiring, Defendant requires its drivers to sign a form acknowledging that they are expected to be able to drive "various jobs, hours and shifts (local & out of town)."[18] Further, the evidence demonstrates that with the exception of Defendant's University shuttle bus drivers, if a driver refuses to perform an assignment without good cause, the refusal is grounds for discipline or being fired.

The Court finds that, based on this undisputed evidence, with the exception of Defendant's University

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[18] The revised version of the hiring standards form, which became effective sometime in 2006, requires Defendant's drivers, upon hiring, to acknowledge that they would be able to work "various jobs, hours, shifts (local & out of town) and be willing and able to drive interstate routes."

shuttle bus drivers, all Defendant's drivers could reasonably be expected to drive Defendant's airport-to-seaport and seaport-to-airport routes, which the Court has found to be movement in interstate commerce within the meaning of the Motor Carrier Act. Moreover, although drivers with seniority are given preference with respect to which routes they will drive, the Court finds that, based on the undisputed evidence in the record, these drivers could, nevertheless, reasonably be expected to drive the airport-to-seaport and seaport-to-airport routes.

However, with respect to Defendant's University shuttle bus drivers, a genuine issue of material fact exists as to whether these drivers could reasonably be expected to make out of State or airport-to-seaport and seaport-to-airport trips. There is evidence that the University shuttle bus drivers are part of the regular driving pool and may be asked to do general charter work, including trips across the State line or airport-to-seaport and seaport-to-airport runs, but Plaintiffs have also submitted evidence that although the University shuttle bus drivers may be asked to do general charter work, they are not required to perform these assignments and are free to turn them down. The record also is unclear with respect to whether some or all of the University shuttle bus drivers signed either of the hiring standards forms. The Court finds that this evidence raises a factual issue concerning whether the University shuttle bus drivers could reasonably be expected to drive routes in interstate commerce. *See Morrison,* 474 F.Supp.2d

at 1311; *Garcia*, 511 F.Supp.2d at 1242; *Mason*, 2005 WL 5395338 at *3.

Accordingly, with the exception of Defendant's University shuttle bus drivers, the Court finds that all Defendant's drivers are exempt from the FLSA's overtime wage requirements because they were or continue to be employed by a carrier whose transportation of passengers is subject to the Secretary's jurisdiction under the Motor Carrier Act, and they were or continue to be engaged in activities of a character directly affecting the safety of operation of motor vehicles in interstate or foreign commerce within the meaning of the Motor Carrier Act. *See* 29 C.F.R. § 782.2; 29 U.S.C. § 213(b)(1).

3. *Defendant's Transportation of Passengers on Airport-to-Seaport and Seaport-to-Airport Routes is Within the Motor Carrier Act's Incidental to Air Exemption, 49 U.S.C. § 13506(a)(8)(A); However, the Incidental to Air Exemption Has No Effect on the Secretary's Power, as Described in 29 U.S.C. § 213(b)(1), to Establish Qualifications and Maximum Hours of Service Pursuant to the Provisions of 49 U.S.C. § 31502*

The Court addresses Plaintiffs argument that, nonetheless, because Defendant's transportation of passengers between seaports and airports falls within the Motor Carrier Act's incidental to air exemption, Defendant's employees are subject to the FLSA's overtime requirements.

The Motor Carrier Act's incidental to air exemption provides: "Neither the Secretary nor the Board has jurisdiction under [Part B of Subtitle IV of Title 49] over . . . transportation of passengers by motor vehicle incidental to transportation by aircraft." 49 U.S.C. § 13506(a)(8)(A). The applicable regulations explain that the "transportation of passengers by motor vehicle is transportation incidental to transportation by aircraft provided (1) that it is confined to the transportation of passengers who have had or will have an immediately prior or immediately subsequent movement by air and (2) that the zone within which motor transportation is incidental to transportation by aircraft . . . shall not exceed in size the area encompassed by a 25-mile radius of the boundary of the airport at which the passengers arrive or depart. . . ." 49 C.F.R. § 372.117(a)(2).

Defendant provides airport-to-seaport and seaport-to-airport motor transportation for cruise line passengers, to and from Miami and Fort Lauderdale airports to and from the Port of Miami and Port Everglades in Fort Lauderdale, immediately prior or immediately subsequent to movement by air. The parties do not dispute that the distance between these airports and seaports does not exceed a twenty-five mile radius "as the crow flies," although the distance by road between these airports and seaports is longer than twenty-five miles. Defendant argues that for purposes of determining the applicability of the Motor Carrier Act's incidental to air exemption, the distance from the airports to the seaports should

be measured by surface miles, using surface transportation over public streets, roads and highways. Plaintiffs argue that the distance from the airports to seaports should be measured in terms of the radius from the relevant airports, "as the crow flies."

As the Court has already noted, the applicable regulation states: "the zone within which motor transportation is incidental to transportation by aircraft . . . shall not exceed in size the area encompassed by a 25-mile radius of the boundary of the airport at which the passengers arrive or depart. . . ." 49 C.F.R. § 372.117(a)(2). The regulation clearly contemplates that the distance should be measured in terms of the radius from the relevant airports, "as the crow flies," and not by surface miles, using surface transportation over public streets, roads, and highways.[19] Accordingly, because Defendant's provision of motor transportation for cruise line passengers, to and from Miami and Fort Lauderdale airports to and from the Port of Miami and Port Everglades in Fort

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[19] The Court notes that the common meaning of "radius" is "a line segment that joins the center of a circle with any point on its circumference," or "a measure of circular area or extent." The American Heritage Dictionary (2d College ed.1985). In contrast to 49 C.F.R. § 372.117(a)(2), the Court notes that the regulation defining the 75-mile exemption set forth in the Family and Medical Leave Act states that the "distance is measured by surface miles," and that the 75-mile distance is not defined as a 75-mile radius; rather, it is defined as a 75-mile distance. *See* 29 C.F.R. § 825.111(b), *held invalid on other grounds, Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1142 (10th Cir.2004).

Lauderdale, is immediately prior or immediately subsequent to movement by air, and the parties do not dispute that the distance between these airports and seaports does not exceed a twenty-five mile radius, the Court finds that Defendant's transportation of passengers on airport-to-seaport and seaport-to-airport routes is within the incidental to air exemption, 49 U.S.C. § 13506(a)(8)(A).

Plaintiffs argue that because Defendant's transportation of passengers on airport-to-seaport and seaport-to-airport routes is within the Motor Carrier Act's incidental to air exemption, the Secretary does not have jurisdiction over such transportation, and thus, the FLSA's motor carrier exemption does not apply. Whereas, Defendant argues – and for the reasons that follow, this Court agrees – that the Motor Carrier Act's incidental to air exemption has no effect on the Secretary's power, as described in 29 U.S.C. § 213, to set qualifications and maximum hours of service for drivers pursuant to the provisions of 49 U.S.C. § 31502.

By way of background, as noted above, the FLSA's motor carrier exemption applies to any employee for whom the Secretary has power to establish qualifications and maximum hours of service for drivers pursuant to the provisions of section 31502 of Title 49, which is within Part B of Subtitle VI of Title 49. 29 U.S.C. § 213(b)(1). As relevant to this action, section 31502 of Title 49 limits the application of

section 31502 to transportation described in section 13501 of Title 49.[20] 49 U.S.C. § 31502. Section 13501 of Title 49, which is within Part B of Subtitle IV of Title 49, gives the Secretary jurisdiction, as specified in Part B, Subtitle IV of Title 49, over interstate transportation as described in section 13501.[21]

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[20] Section 31502 provides:

(a) Application. – This section applies to transportation –

(1) described in sections 13501 and 13502 of this title

* * *

(b) Motor carrier and private motor carrier requirements. – The Secretary of Transportation may prescribe requirements for –

(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and

(2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.

[21] As set forth in note 7, *supra*, section 13501 provides, in full, as follows: The Secretary and the Board have jurisdiction, [as specified in Part B of Subtitle IV of Title 49], over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier –

(1) between a place in –

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(Continued on following page)

49 U.S.C. § 13501. Section 13506(a)(8)(A) exempts from the Secretary's jurisdiction under Part B of Subtitle IV of Title 49 motor transportation that is incidental to transportation by air. 49 U.S.C. § 13506(a)(8)(A).

Plaintiffs argue that because (1) section 31502 applies to the transportation described in section 13501, and (2) section 13501 gives the Secretary jurisdiction as specified in Part B, Subtitle IV of Title 49, over interstate transportation as described in section 13501, then (3) the Secretary's power to establish qualifications and maximum hours of service pursuant to section 31502 is contingent upon the scope of the Secretary's jurisdiction as specified in Subtitle IV, Part B, of Title 49. However, Plaintiffs' argument lacks merit because contrary to Plaintiffs' interpretation of the statute, section 31502 does not incorporate the exemptions from the Secretary's jurisdiction contained in Part B of Subtitle IV of Title

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(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

49 U.S.C. § 13501.

49, such as the "incidental to air" exemption contained in section 13506(a)(8)(A); rather, section 31502 merely incorporates the types of transportation described in section 13501. In other words, section 31502 incorporates by reference only section 13501's description of interstate transportation and *not* any of the exemptions. Therefore, while the incidental to air exemption contained in section 13506 affects the Secretary's jurisdiction under Subtitle IV, Part B, it does not affect the applicability of section 31502 to all of the types of transportation described in section 13501.

While the Court's foregoing conclusion is based on reading the plain language of the statute, the Court also notes its agreement with, and adopts, the Second Circuit's analysis in *Bilyou v. Dutchess Beer Distributors, Inc.*, 300 F.3d 217 (2d Cir.2002). In *Bilyou*, the court found that another exemption – the primary business exemption, found at 49 U.S.C. § 13505 – had "no bearing on the Secretary's power, as described in 29 U.S.C. § 213(b)(1) to 'establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49,'" because section 13505 limits the Secretary's jurisdiction "under this part," which, the *Bilyou* court found concerns only the economic and licensing authority conferred by Part B of Subtitle IV of Title 49, and has no effect on the Secretary's safety regulation and operating authority pursuant to

section 31502, which is found in Part B of Subtitle VI of Title 49.[22] *Bilyou*, 300 F.3d at 226 ("The fact that § 13505 denies the Secretary power to prescribe economic and licensing regulations of the sort covered in Subtitle IV, Part B, in no way contradicts the Secretary's authority, established in a different part of the Motor Carrier Act, to set qualifications and maximum hours of service for drivers to promote safety of operations."); *see also Dauphin v. Chestnut Ridge*

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[22] The Court notes that in reaching this determination, the *Bilyou* court looked at the "history and purpose of precursor provisions in the MCA," from which it clearly appears that the incidental to air exemption has always been an exemption from economic regulation only. *See Bilyou*, 300 F.3d at 226; *see also Kimball*, 131 M.C.C. at 916 ("The subsidiary question presented by petitioner (whether petitioner's operation, assuming it is in interstate commerce, is nonetheless exempt from the [STB's] *economic regulation* [pursuant to the incidental to air exemption]) is irrelevant to the issue of the character of the commerce [as interstate or intrastate].") (emphasis added); *Air Dispatch, Inc. v. United States*, 237 F.Supp. 450, 451-52 (E.D.Pa.1964) ("This service [rendered by the plaintiffs at either or both ends of the line-haul movement of goods by the airline] is exempt from *economic regulation* by the I.C.C. where the collection or delivery is a part of the continuous movement of goods in air transportation on a through bill of lading issued by a direct carrier or the air freight forwarder [pursuant to the old incidental to air exemption contained in § 203(b)(7) of the Interstate Commerce Act].") (emphasis added); *City of Philadelphia v. Civil Aeronautics Bd.*, 289 F.2d 770 (D.C.Cir.1961) ("Whether the Philadelphia-Newark truck haul should be considered as incidental to air transportation within the meaning of the Interstate Commerce Act, and thereby exempt from *economic regulation* under that statute, is a matter for the Interstate Commerce Commission.") (emphasis added).

*Transp., Inc.*, No. 06 Civ. 2730, 2008 WL 793612 (S.D.N.Y. Mar. 26, 2008) (applying *Bilyou*, and explaining that the "operative language of section 13506 is identical to that of the section 13505 exemption addressed in *Bilyou*, in that both purport to limit the Secretary's jurisdiction only 'under this part,'" and finding that "the effect of the two provisions on the motor carrier exemption should [not] be different").

The Court also notes Plaintiffs' reliance on *Mielke v. Laidlaw Transit, Inc.*, 102 F.Supp.2d 988, 992 (N.D.Ill.2000) (finding that "the FLSA applies to a motor carrier's employees when those employees are excepted from the Transportation Department's jurisdiction, whether by operation of statute or regulation"). However, the Court is not persuaded by the *Mielke* court's analysis, which contradicts this Court's reading of the statute. *See also King v. Asset Appraisal Servs., Inc.*, 470 F.Supp.2d 1025, 1031 (D.Neb.2006) (rejecting *Mielke*).

In view of the Court's foregoing analysis and conclusions, the Court also notes that this case is distinguishable from *Spires v. Ben Hill County*, 980 F.2d 683 (11th Cir.1993), upon which Plaintiffs also rely. In *Spires*, the Eleventh Circuit determined, based on both the ICC's decision in *Lonnie W. Dennis*, 63 M.C.C. 66 (1954), and on the FMSCR, 49 C.F.R. § 390.3(f)(4)-(5), that the Secretary has no jurisdiction over ambulance and rescue services, and that therefore, the motor carrier exemption to the FLSA's overtime requirements did not apply to employees providing such services. *Spires*, 980 F.2d at 686-87

(quoting the FMCSR at 49 C.F.R. § 390.3(f)(3)-(4), which expressly except "[t]he transportation of human corpses or sick and injured persons" from the jurisdiction of the Motor Carrier Act).

However, *Spires* did not involve the same issue of statutory interpretation now before this Court. In holding that ambulance and rescue services are not subject to the USDOT's jurisdiction under the Motor Carrier Act, the *Spires* court did not address the issue of whether the exemptions from the Secretary's jurisdiction contained in Part B of Subtitle IV of Title 49 – *e.g.* the "incidental to air exemption" in section 13506(a)(8)(A) – have any effect on the Secretary's power, as described in 29 U.S.C. § 213, to set qualifications and maximum hours of service for drivers pursuant to the provisions of 49 U.S.C. § 31502. Thus, *Spires* does not preclude this Court from finding, as set forth above, that while the incidental to air exemption contained in section 13506 affects the Secretary's jurisdiction under Subtitle IV, Part B, it does not affect the applicability of section 31502 to all of the types of transportation described in section 13501, and therefore has no effect on the Secretary's power, as described in 29 U.S.C. § 213, to set qualifications and maximum hours of service for drivers pursuant to the provisions of 49 U.S.C. § 31502.

*MINIMUM WAGE CLAIMS*

Defendant moves for summary judgment on Plaintiffs claim that Defendant failed to compensate them at or above the minimum wage. The record contains the following evidence relevant to this claim:

Plaintiff Charlene Blackshear testified during her deposition that she regularly drove a route from Florida City to Marathon and back, and that she received a flat fee of between $130 and $140 to drive the route. (Blackshear Dep. 26-34, Nov. 19,2007.) Blackshear testified that she would work a total of thirteen or fourteen hours on the days that she drove these routes. However, notwithstanding the fact that this flat fee arrangement would admittedly break down to approximately $10 per hour, according to Blackshear, she was paid the flat rate of $130 to $140 only for the hours between 3:00 p.m., when she would leave Florida City at the start of her route, and approximately 2:45 a.m., when she would return the bus to Defendant. (Blackshear Dep., 26-34, Nov. 19, 2007.) Blackshear testified that she was not being paid for the hours between 12:45 p.m., when she would sign in with Defendant and drive to Florida City, and 3:00 p.m., when she would leave Florida City at the start of her route. (Blackshear Dep. 26-34, Nov. 19, 2007.)

Plaintiff Teddy Barrett has provided a sworn statement that during the weekly pay period ending on April 12, 2007, he had one driving assignment, involving the transportation of passengers from Port Everglades to Bayside and back, and that he worked

a total of approximately 9.5 hours, for which he was paid a total of $36.00. (Barrett Affirmation ¶ 3.)

Plaintiffs have failed to produce any other evidence that they were compensated at an effective hourly rate below the federal minimum wage requirement set forth in 29 U.S.C. § 206.

Nonetheless, Plaintiffs argue the Court should deny summary judgment on this claim because they have presented evidence that the drivers' logbooks are not an accurate reflection of the hours its drivers actually work. Also Defendant admits that it keeps track of the hours its drivers work by its drivers' logbooks, which Defendant keeps for six months, and its "boards," which do not show all the actual hours worked by the drivers. (Pls.' SMF ¶ 7.)

The FLSA requires that employers pay employees a minimum wage, establishes a maximum number of hours that an employee can work at a regular pay rate, and requires overtime pay for hours worked in excess of the maximum. 29 U.S.C. §§ 201 *et seq.* The federal minimum wage during the period from September 1, 1997 through July 20, 2007 was $5.15 per hour. *Id.* at § 206(a)(1). As of July 20, 2007 the minimum wage is $5.85 per hour. *Id.* The United States Supreme Court has defined "regular rate" as referring to the "hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed." *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419, 65 S.Ct. 1242, 89 L.Ed. 1705 (1945).

The Department of Labor (DOL) has adopted this definition and stated that the regular rate cannot be less than the minimum wage. 29 C.F.R. §§ 778.107-108. The DOL has stated that the "regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." *Id.* at § 778.109.[23] *See also Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251, 1256 (11th Cir.2001) (explaining that the regular rate of pay is calculated by dividing all of the employer's total compensation for the workweek by the number of hours worked).

The effective hourly rate for determining minimum wage violations is calculated by dividing the amount of compensation paid during a workweek by the total number of hours the employee worked during that workweek. In other words, it is the workweek as a whole rather than each individual hour within a workweek that is the relevant unit for determining compliance with the minimum wage requirement.

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[23] 29 C.F.R. § 778.109 provides in relevant part: "The 'regular rate' under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such cases the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom, and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek. . . ."

*See, e.g., Posely v. Eckerd Corp.,* 433 F.Supp.2d 1287, 1308 (S.D.Fla.2006) (granting summary judgment for employer in minimum wage claim where plaintiffs conceded "that when dividing their total weekly compensation by the total number of hours they worked in any given week, they never received less than $5.15 per hour"); *see also United States v. Rosenwasser,* 323 U.S. 360, 363-64, 65 S.Ct. 295, 89 L.Ed. 301 (1945) (approving the averaging of earnings over a standard workweek to determine whether minimum wage law has been violated); *Overnight Motor Tranp. Co. v. Missel,* 316 U.S. 572, 580 n. 16, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942) *superseded by statute on other grounds* (holding that to determine whether minimum wage law has been violated, one must divide total weekly pay received by total number of hours worked); *Dove v. Coupe,* 759 F.2d 167, 168 (D.C.Cir.1985); *Roland Elec. Co. v. Black,* 163 F.2d 417, 420-21 (4th Cir.1947); *Hutson v. Rent-A-Center, Inc.* 209 F.Supp.2d 1353, 1359-60 (M.D.Ga.2001); *Marshall v. Sam Dell's Dodge Corp.,* 451 F.Supp. 294, 302 (N.D.N.Y.1978).

An employee who brings a lawsuit under the FLSA for unpaid minimum wages or unpaid overtime compensation and liquidated damages bears the initial burden of proving that he performed the work for which he was not properly compensated. *Santelices v. Cable Wiring,* 147 F.Supp.2d 1313, 1328 (S.D.Fla.2001) (citing *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687-88, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), *superceded by statute on other*

*grounds as stated in Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293 (D.C.Cir.1972)). In *Mt. Clemens*, the Court recognized that "[w]hen the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records," but "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises." 328 U.S. at 687, 66 S.Ct. 1187. The *Mt. Clemens* Court held that in "such a situation . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.; see Leonard v. Carmichael Properties & Management Co.*, 614 F.Supp. 1182, 1186 (S.D.Fla.1985) ("A prima facie case can be made through an employee's testimony giving his recollection of hours worked, although the court need not accept every element of the plaintiff's case simply because the employer fails to produce records. A FLSA case is not to be dismissed nor should recovery be denied because proof of the number of hours worked is inexact or not perfectly accurate. Where the inaccuracy is due to the employer's failure to keep adequate records as required by statute, and the employee has demonstrated that *some* work was performed for which he was improperly compensated, there is a right to recovery, even though the amount may be uncertain and damages difficult to calculate.") (citations omitted); *Brock v. Norman's Country Market, Inc.*, 835 F.2d

823, 828 (11th Cir.1988) ("It is firmly established where an employer has not kept adequate records of their employee's wages and hours as required by the FLSA, the employees will not be denied a recovery of back wages on the ground that their uncompensated work cannot be precisely determined.") (citations omitted).

With the exception of the affirmation of Teddy Barrett, the Court agrees with Defendant that Plaintiffs have failed to present any evidence whatsoever that they were compensated at an effectively hourly rate below the federal rate of $5.15 per hour in violation of the FLSA's minimum wage requirement. Where, as here, the employer fails to keep adequate time records, the employee still must be able to prove that he or she has in fact performed work for which he or she was improperly compensated, and may do so by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Even under this standard, the Court finds that Plaintiffs have failed to present any genuine issue for trial as to any Plaintiff other than Teddy Barrett.

Accordingly, Defendant's motion for summary judgment in its favor as to Plaintiffs' minimum wage claim should be granted, except as to Plaintiff Teddy Barrett. Genuine issues of material fact remain as to whether Plaintiff Teddy Barrett was compensated at an effectively hourly rate below the federal rate of $5.15 per hour. *See Mt. Clemens Pottery Co.*, 328 U.S. at 687-88, 66 S.Ct. 1187 (explaining that where an

employee carries out his or her burden by proving that he or she has in fact performed work for which he or she was improperly compensated, the "burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence").

*STATUTE OF LIMITATIONS*

Plaintiff moves for summary judgment on Defendant's fourth affirmative defense – that any violation on its part of the FLSA was not willful. The "statute of limitations for claims seeking unpaid overtime wages [or minimum wages] generally is two years [after the cause of action accrued], but if the claim is one 'arising out of a willful violation,' another year is added to it." *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1162 (11th Cir.2008) (quoting 29 U.S.C. § 255(a)). "To establish that the violation of the Act was willful in order to extend the limitations period, the employee must prove by a preponderance of the evidence that his employer either knew that its conduct was prohibited by the statute or showed reckless disregard about whether it was." *Id.* at 1162-63 (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988)). As defined by the Code of Federal Regulations, "reckless disregard" is the "failure to make adequate inquiry into whether conduct is in compliance with the Act." *Id.* at 1163 (quoting 5 C.F.R. § 551.104). The "three-year statute of limitations may

apply even when the employer did not knowingly violate the FLSA; rather, it may apply when it simply disregarded the possibility that it might be violating the FLSA." *Allen v. Bd. of Public Ed.*, 495 F.3d 1306, 1324 (11th Cir.2007). "If an employer acts unreasonably but not recklessly in determining its legal obligation under the FLSA, then its actions should not be considered willful and the two-year statute of limitations should be applied." *Id.* (citations omitted). "The determination of willfulness is 'a mixed question of law and fact.'" *Id.* The law is unclear in the Eleventh Circuit as to whether the determination of willfulness for purposes of ascertaining the statute of limitations period is to be decided by the jury. *Id.* at 1163 & n. 3. Indeed, in *Alvarez Perez*, the Eleventh Circuit indicated that it may be a decision either for the judge or the jury. *Id.*

Plaintiffs argue that the Court should find as a matter of law that Defendant's actions giving rise to their FLSA claim were willful, and that therefore the three-year statute of limitations should apply. However, with the exception of Plaintiff Teddy Barrett and any Plaintiffs who are or were University shuttle bus drivers, the Court has determined that Defendant has not violated the FLSA. The only remaining questions of fact as to the issue of Defendant's FLSA violations are whether Plaintiff Teddy Barrett was compensated at an effective hourly rate below the federal minimum wage, and whether any Plaintiffs who are or were University shuttle bus drivers could reasonably be expected to make trips across the

State line or to drive airport-to-seaport and seaport-to-airport routes. Thus, the Court cannot make a determination on the issue of willfulness until the issue of Defendant's violation of the FLSA is determined. *See Allen,* 495 F.3d at 1324 (concluding that because "triable issues of fact remain[ed] as to some of [the p]laintiffs' claims that they worked overtime without compensation . . . a determination of which statute of limitations to apply must be reserved until it is determined whether a violation of the FLSA occurred").[24]

*LIQUIDATED DAMAGES*

Plaintiff also moves for summary judgment on the issue of their entitlement to liquidated damages. The FLSA provides that "[a]ny employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). However, "the Portal-to-Portal Act . . . provides a good faith defense to employers to an award of liquidated damages 'if the employer shows to the satisfaction of the court that the act or omission giving rise to such

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[24] The Court notes that as to Teddy Barrett's claim, such a determination is irrelevant because Barrett filed his minimum wage claim within two years after his cause of action accrued.

action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA].'" *Spires,* 980 F.2d at 689 (quoting 29 U.S.C. § 260). "If a court determines that an employer has established a good faith defense, it may, 'in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of [Title 29].'" *Id.* The Eleventh Circuit has articulated the following standard for establishing a good faith defense:

> An employer who seeks to avoid liquidated damages bears the burden of proving that its violation was "both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." An employer who knew or had reason to know that the FLSA applied, could not establish good faith as a defense. . . . Liquidated damages are mandatory absent a showing of good faith.

*Id.* (quoting *United States v. McKennon,* 814 F.2d 1539 (11th Cir.1987) and citing 29 C.F.R. § 790.13-.22). The FLSA "assigns to the judge the role of finding whether the employer acted in subjective and objective good faith for liquidated damages purposes." *Alvarez Perez,* 515 F.3d at 1163 (citing 29 U.S.C. § 260). As set forth above, with the exception of Plaintiff Teddy Barrett, and any Plaintiffs who are or were University shuttle bus drivers, the Court has determined that Defendant has not violated the FLSA. A determination as to Defendant's good faith for purposes of deciding liquidated damages as to

Teddy Barrett's minimum wage claim and the overtime wages claims of any Plaintiffs who are or were University shuttle bus drivers, is premature insofar as the issue of Defendant's violation of the FLSA has yet to be determined.

*FLORIDA WHISTLE-BLOWER'S ACT CLAIMS*

Defendant moves for summary judgment on Plaintiffs' claims that they were terminated in violation of Florida's Whistle-Blower's Act, §§ 448.101-05. However, the Court declines to exercise supplemental jurisdiction over these claims.

As a general rule, "the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact,' such that 'the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises just one constitutional case.'" *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 164-65, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997). Congress has codified those principles in the supplemental jurisdiction statute, 28 U.S.C. § 1367, which provides, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *Id.* at 165, 118

S.Ct. 523 (quoting 28 U.S.C. § 1367(a)). "That provision applies with equal force to cases removed to federal court as to cases initially filed there; a removed case is necessarily one 'of which the district courts . . . have original jurisdiction.'" *Id.* (citations omitted). "Once subject matter jurisdiction exists, a district court has constitutional authority to hear related state claims even if the federal claim is later dismissed. . . ." *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1222 (10th Cir.2000).

The exercise of supplemental jurisdiction is discretionary. *Int'l College of Surgeons*, 522 U.S. at 172, 118 S.Ct. 523. A federal district court may decline to exercise supplemental jurisdiction over a state law claim if:

> (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). The Court finds that Plaintiffs claims that they were terminated in violation of Florida's Whistle-Blower's Act, involve novel issues of State law. Specifically, the issue of whether Plaintiffs engaged in statutorily protected activity under the Florida Whistle-Blower act by objecting to, or refusing to participate in, an actual violation of a law,

rule, or regulation by Defendant raises novel questions under Florida law. Thus, pursuant to 28 U.S.C. § 1367(c)(3), and in consideration of the interests of judicial economy, convenience and fairness to the litigants, this Court declines to exercise supplemental jurisdiction over Plaintiff's Whistle-Blower's Act claims.

*CLAIMS OF CERTAIN OPT-IN PLAINTIFFS ARE BARRED*

Plaintiffs do not dispute that opt-in Plaintiffs Marvin Davis, Eduardo Guillen, Edney Joseph, and Reinaldo Mayo performed no work for Defendant in the three years prior to filing their opt-in notices on February 5, 2008. Therefore, these Plaintiffs' claims are time-barred, and must be dismissed with prejudice. 29 U.S.C. §§ 255, 256.

Additionally, Defendant argues that the claims of five other opt-in Plaintiffs – Emmanual Darville, Edith Eugene, Mario Felizola, Victor Perez, and Eduardo Velez (the "Darville Plaintiffs") – are barred under the doctrine of *res judicata*, or claim preclusion, because these Plaintiffs' claims against Defendant for overtime compensation under the FLSA were dismissed with prejudice in *Darville v. American Coach Lines of Miami, Inc.*, Case No. 06-20758-CIV-LENARD-TORRES. Claim preclusion bars a plaintiff from bringing a subsequent lawsuit when four requirements are met: "(1) there must be a final judgment on the merits, (2) the decision must be

rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases." *Pelletier v. Zweifel*, 921 F.2d 1465, 1501 (11th Cir.1991) (citations omitted). Plaintiffs do not dispute that all four elements are met with respect to the Darville Plaintiffs; rather, Plaintiffs argue that application of the doctrine would be inequitable in this case because, according to Plaintiffs, the Darville Plaintiffs' counsel in *Darville* submitted a stipulated voluntary dismissal with prejudice, dismissing the Darville Plaintiffs' claims without their knowledge. Thus, according to Plaintiffs, although their claims are barred by the *res judicata* doctrine, it would inequitable if they were denied recovery. In this respect, the Court notes that the Darville Plaintiffs may have a malpractice suit against their counsel arising out of the *Darville* action; however with respect to this action, because all four of the requirements for claim preclusion are met, the Darville Plaintiffs' claims are barred by the doctrine of *res judicata*, and must be dismissed with prejudice.

## *CONCLUSION*

Based on the Court's foregoing analysis and conclusions, it is hereby

ORDERED AND ADJUDGED that the parties' respective motions for summary judgment as to the issue of whether Plaintiffs are exempt from the

FLSA's overtime requirements under the motor carrier exemption, 29 U.S.C. § 213(b)(1) are GRANTED IN PART and DENIED IN PART in accordance with this Order. Summary judgment is entered in Defendant's favor as to Plaintiffs' claim for violation of the FLSA's overtime wage provision, 29 U.S.C. § 207, except as to any Plaintiffs who are or were University shuttle bus drivers. Defendant's motion for summary judgment as to Plaintiffs' overtime wage claim with respect to any Plaintiffs who are or were University shuttle bus drivers is DENIED because genuine issues of material fact remain with respect to those Plaintiffs. It is further

ORDERED AND ADJUDGED that Defendant's motion for summary judgment as to Plaintiffs' minimum wage claim is GRANTED IN PART and DENIED IN PART in accordance with this Order. Summary judgment is entered in Defendant's favor as to Plaintiffs' minimum wage claim, except as to Plaintiff Teddy Barrett. Defendant's motion for summary judgment as to Teddy Barrett's minimum wage claim is DENIED because genuine issues of material fact remain with respect to his claim. It is further

ORDERED AND ADJUDGED that Plaintiffs' motion for summary judgment as to the issue of whether a two-year or three-year statute of limitations applies to Plaintiffs' FLSA claims is DENIED in accordance with this Order. It is further

ORDERED AND ADJUDGED that Plaintiffs' motion for summary judgment as to the issue of whether Defendant is liable for liquidated damages under the FLSA is DENIED in accordance with this Order. It is further

ORDERED AND ADJUDGED that Plaintiffs' Florida Whistle-Blower's Act claims are DISMISSED WITH PREJUDICE in accordance with this Order. It is further

ORDERED AND ADJUDGED that the claims of opt-in Plaintiffs Marvin Davis, Eduardo Guillen, Edney Joseph, Reinaldo Mayo, Emmanual Darville, Edith Eugene, Mario Felizola, Victor Perez, and Eduardo Velez are DISMISSED WITH PREJUDICE in accordance with this Order. It is further

**ORDERED AND ADJUDGED that within fifteen days of the date of entry of this Order, the parties shall submit a joint report identifying each Plaintiff who is or was a University shuttle bus driver as defined in this Order.**

DONE AND ORDERED.

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 08-15636-BB

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ELMO WALTERS,
ALIX PROVENCE,
CHARLENE BLACKSHEAR,
CEDRIC JORDAN,
and all others similarly situated,

Plaintiffs-Appellants,

versus

AMERICAN COACH LINES OF MIAMI, INC.,
a Florida corporation,

Defendant-Appellee.

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On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Oct. 5, 2009)

Before: DUBINA, Chief Judge, BIRCH and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

**49 C.F.R. § 372.117 Motor transportation of passengers incidental to transportation by aircraft.**

(a) *Passengers having an immediately prior or subsequent movement by air.* The transportation of passengers by motor vehicle is transportation incidental to transportation by aircraft provided (1) that it is confined to the transportation of passengers who have had or will have an immediately prior or immediately subsequent movement by air and (2) that the zone within which motor transportation is incidental to transportation by aircraft, except as it may be individually determined as provided in section (c) herein, shall not exceed in size the area encompassed by a 25-mile radius of the boundary of the airport at which the passengers arrive or depart and by the boundaries of the commercial zones (as defined by the Secretary) of any municipalities any part of whose commercial zones falls within the 25-mile radius of the pertinent airport.